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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 349

GILBERT E. THIEL,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,
Respondent.

RESPONDENT'S BRIEF

ARTHUR B. DUNNE
333 Montgomery Street,
San Francisco, Calif.,
Attorney for Respondent

PARKER PRINTING COMPANY, 543 SANSOME STREET, SAN FRANCISCO

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28 U.S.C.A. §425	6
50 U.S.C.A. §57	4n

TEXTS, ETC.

3 Bl. Com.	30n, 32n
2 Comyn's Digest, 3ed. (1792) 199, Challenge (A. 4)	30n, 32n
Dunning, Reconstruction, 22 Am. Nation Series, 255	5n
Flack, Adoption of the Fourteenth Amendment, esp. at 40	4n, 5n
19 Halsbury's Laws of England, 2 ed., 303 (Title Juries, par. 631)	30n
9 Holdsworth, History of English Law, 186-190	32n
Knox, U. S. Dist. Judge—Views	17n, 32n, 39n, 71
McLaughlin, A Constitutional History of the United States, Stud. ed., 653	4n
Proffatt, Jury Trial, §116 at p. 163:	
§114	32n
§116	5n
§119	33n
§149 et seq.	30n

Pages.

Storey, Charles Sumner, 30 Am. Statesmen Series, 401 et seq. 7n
Swisher, American Constitution Development, 312-316 4n

Thompson and Merriam, Juries (1882):
§§21-26 32n
§§34-38 33n
§48 et seq. 2n
§126 30n

1 Wigmore, Evidence, 3rd Ed., §17 60n

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 349

GILBERT E. THIEL,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,
Respondent.

RESPONDENT'S BRIEF

I.

PRELIMINARY STATEMENT[1]

A. NATURE OF PETITIONER'S ACTION.[2]

Petitioner, a salesman,[3] his wife and a male companion, Johnny Morris, spent Sunday, February 18, 1940, to Sun-

1. Arabic numerals in parenthesis preceded by "R" refer to pages of the printed portion of the record, preceded by "f" to pages of the typewritten and unprinted portions of the record. References to the petition for certiorari, supporting brief, or reply brief, are to the typewritten copies and this is indicated by "f". Emphasis by bold face type is ours.

2. A fuller, though still summary, statement of the facts is in respondent's Answer to Petition for Certiorari, pp. 3-8.

3. The petition for certiorari says that petitioner was a machinist. His complaint alleged he was a salesman (R 5). Petitioner's occupation, and his claims of what his occupation was, are dealt with at page 62 below.

day evening, February 25, 1940, in Reno, Nevada. During that week, but not after noon of Saturday, the 24th, petitioner drank and gambled. He did not drink after noon Saturday, the 24th. He was sober at the time of the accident of this action. About 8:40 p.m., Sunday, the 25th, his wife, Morris and he, boarded respondent's Train No. 9 at Reno, to go to San Francisco, California. They sat in the second day-coach. The train left Reno about 8:50 p.m.

After the train left Reno, while it was in motion, petitioner, Morris and a fellow passenger, Rippetoe, left the second coach and went forward to the smoker, the first day-coach. In the smoker petitioner and Morris sat together, petitioner next to the window, Morris toward the aisle. Rippetoe took the seat just ahead. About 25 minutes out of Reno, the conductor came through the smoker, lifting tickets. Morris surrendered the tickets for his party. The conductor had passed on, a step or two, when petitioner, without warning, suddenly opened the window and jumped out, so fast that it was impossible for Rippetoe, Morris and the conductor to stop him. They tried. Petitioner was hurt.

Petitioner had no connection with respondent except that of a passenger. There was no relationship of employer and employee. His action was one by a passenger against a carrier for damages for personal injuries claimed by the passenger to have resulted from negligence of the carrier. His complaint shows on its face that the immediate cause of his injury was his own voluntary act.

B. EARLIER PROCEEDINGS IN THIS CASE.

This action was commenced in the California Superior Court for San Francisco on December 30, 1940. Petitioner alleged that he "was 28 years of age * * * and was employed as a salesman and was earning about $200.00 per month;" that while a passenger "and while said train was in motion" he "suddenly opened the window of said train and leaping out" was injured (R 3-5).

Respondent removed the action into the United States District Court for the Northern District of California, Southern Division,[4] and answered. It set up appropriate defenses by denial and affirmative statement (R 5-9).

Petitioner twice moved to remand to the state court. His motions were denied. On respondent's petition attempts to proceed in the state court, in defiance of the orders of the District Court denying his motions, were enjoined.[5] On appeal the decree was affirmed. *(Thiel v. Southern Pacific Company*, 126 F.2d 710 (C.C.A. 9, 1942)). This court denied certiorari (316 U. S. 698, 86 Led. 1767).

The decision of the Circuit Court of Appeals was followed by reckless and unsupported charges of unfairness, bias or fraud against everyone. The petition for certi-

4. Before trial it was determined that the removal was proper. *(Thiel v. Southern Pacific Company*, 126 F.2d 710 C.C.A. 9, — No. 9912), cert. den. 316 U.S. 698, 86 Led. 1767, Oct. Term, 1941, No. 1206.) Since all of these proceedings are matters of record, heretofore certified to the Circuit Court of Appeals for the Ninth Circuit and to this court, the proceedings on removal, motion to remand, and enjoining further proceedings in the state court, are omitted by stipulation from the record on this appeal, and a summary statement is substituted. The stipulation provides that the earlier record can be looked to and is deemed part of this record (R 1, 2).

5. See footnote 4 above.

orari charged that the Circuit Court of Appeals ignored the merits; that its decision was the result of unfairness, bias and prejudice.[6] Denial of the petition brought an attack on the District Judge charging, without foundation, bias and prejudice.[7]

The next attack was on the clerk of the Court and the jury commissioner.[8] This gave rise to the matter here under review.

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6 The Circuit Court of Appeals was charged with a prejudicial attitude, "bias", "improper attitude", "unfair remarks and hostile attitude", depriving appellant of "a fair hearing", "closing its eyes" to the true facts and the evidence, and being "extremely technical and unfair". The petition said that "it ignored the facts and the law" and that reversal was required to insure hearing by "an unprejudiced court".

7 The supporting affidavit was so wanting in substance that it was stricken. But Judge St. Sure, although not disqualified, did not care to act further and thereafter determined only minor matters by consent.

By stipulation, the claim of disqualification, the affidavit attempting to charge bias and prejudice, and the counter affidavit, were omitted from the record. A summary statement was substituted (f 15). The stipulation, part only of which has been printed (R 1, 2), is part of this record. It provides that these papers may be looked to (f 15, 16).

8 The attack continues in the petition for certiorari and supporting brief. It is said that "the jurors were all 'hand-picked' instead of being selected by lot and 'peculiarly' they were nearly all connected with said defendant company by business, social or other ties and thus subject to influence by said defendant company" (f 2); that "the irregular jury selection methods * * * have become a *PUBLIC SCANDAL* casting a *bad odor* on the whole jury procedure in the Federal Court" (f 17) [in fact it was the same system followed for 30 years without "scandal" or "bad odor"—see below]; that "the tremendous influence of the *TWO BILLION DOLLAR* Southern Pacific Co. which had many 'friends' in other places beside the Federal jury became apparent as its vicious control over and corruption of the Federal jury system by 'subtle' methods was being exposed for the first time" (f 19); that there was no doubt "about the Southern Pacific's influence over the jury" (f 36). (Emphasis is petitioner's.)

These charges are at one with those made in appellant's brief in the court below that "the jury system has, in effect, been cor-

On March 5, 1941, petitioner filed a demand for trial by jury (R 9). On November 5, 1942, he filed a notice of motion to strike out or quash the jury panel (R 9-11), and what purported to be a supporting affidavit of his attorney (R 11-15). The motion was heard on November 9, 1942, by Judge Bowen (W. Dist. Wash. sitting in the N. Dist., Calif.), testimony was taken (R 15-68) and the motion was denied (R 68).[9] The proceedings are set out in the printed record (R 9-68). The facts are dealt with at pp. 62-75 below.

At the pre-trial conference on November 21, 1942, petitioner belatedly moved to withdraw his demand for trial by jury. The trial court emphatically stated that it preferred a jury. Respondent then refused to consent (see Fed. Rules Civ. Proc., Rule 38 (d)) and the request was denied (R 70-72).

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rupted, in favor of Southern Pacific Company" (p. 89); that the system is a "malodorous jury selection system" and "iniquitous jury methods" are used (p. 90); that "the superabundance of jurors" who have some connection with respondent "cannot be attributed to mere coincidence or chance" (p. 90).

9. The petition states that Judge Bowen denied the motion with the remark "that since a somewhat similar motion had been denied here some months before in a criminal case, it was not for him who was merely an outside judge from Seattle, Washington, to come to San Francisco and change the jury system which was being followed for so many years." (Petition, f 5. The only record reference is f 101.) There is nothing of the sort in the record (R 39, 40). In the supporting brief (f 34) it is said: "Judge Bowen bluntly stated that it was not for him as an outside judge to change a system so long in operation and denied the motion." (The only record reference is f 137.) There is no such statement in the record (R 68).

The Court did say, during the taking of testimony on petitioner's motion: "The Court will give both sides an opportunity to call such witnesses as they may wish to call" (R 39). The opportunity was given. At the conclusion of this testimony the Court said: "I wish you gentlemen to have an opportunity to argue this. I would like you to do it this afternoon" (R 68).

The next attack was on the twelve jurors selected to try the case. The case went to trial on November 24, 1942. The impanelment of the jury is set out in the printed record (R 73-131). The substance is in Appendix B to this brief. Petitioner expressly passed for cause every juror who sat except one, Julian H. Hales. He was not challenged. After peremptory challenges had been exercised or passed, and twelve jurymen had been passed for cause, the court asked "Does the plaintiff accept the jury?" Petitioner's counsel: "Yes, subject to a motion which I will make outside of the presence of the jury" (R 123, 124). The jury was sworn and the noon recess taken. When court reconvened petitioner's attorney attempted "to enter a challenge to the twelve jurors chosen to try this case," for cause "on all the grounds which have been set forth in plaintiff's previous motion to strike out the entire jury panel" and upon the further grounds that there are on the jury "at least six jurors who are closely affiliated and connected with Southern Pacific Company," and petitioner's attorney specified Mr. Gale, Mrs. Goeppner, Mr. Hohweisner, Mr. Levensaler, Mr. Knight (whom he confused with a juryman who had been excused) and Mr. Bright (R 124, 125. See App. B). After discussion (R 125-131) the motion was denied. The Court, with the advantage of having seen and heard *(again on dire)* the jurors *(State v. Lauth*, 46 Ore. 342, 80 P. 660, 662 (1905) and see pp. 42-47 below) said:

> "There not having been any challenge for cause of any juror that is here sworn to try this case * * * and believing as I firmly do, that as a matter of fact, **the plaintiff has a fair jury** to try his case—I have listened very carefully to the interrogation of jurors

by counsel on both sides; * * * and the Court has considered the business and social connection of the jurors * * * and after giving this consideration and hearing these questions asked, and hearing the answers given by the jurors, **the Court is firmly convinced that this jury is in fact a fair jury,** and the motion is denied." (R 134)

The trial proceeded[10] and defendant (respondent) had a verdict and judgment (R 74). The judge who tried the case (Hon. John C. Bowen, of Seattle, Washington) has not escaped attack for claimed unfairness.[11] It goes without saying that neither respondent's counsel nor its witnesses have been slighted.

After judgment, petitioner moved for judgment *n.o.v.*, or, in the alternative, for a new trial. The motion was heard by the District Judge, who denied the motion to

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10. Before Judge Bowen, who had heard and denied the challenge to the array.

11. It was charged that Judge Bowen agreed that counsel might have an opportunity to state objections to proposed instructions, but violated this understanding and Fed. Rules of Civ. Proc., Rule 51, and refused such an opportunity. (Petitioner's Brief below, pp. 11, 23, 97.)

The record shows: The parties rested on the afternoon of November 27, 1942 (f 903). The jury was excused until 9 o'clock the next day and it was "ordered that the attorneys appear at 8:30 o'clock A.M. on said day for hearing of the objections to the proposed instructions to the jury" (R 74). Such hearing was had. After the jury was charged, it withdrew at the court's direction and the Court invited counsel to state objections to the charge (f 968, 969). Respondent's counsel fully stated his objections (f 968, 969, 972-984). Petitioner's counsel contented himself with saying that he excepted to all instructions except eight, which he designated by number (f 968). No grounds of objection were stated. The jury returned, the Court corrected one instruction (f 969, 970), and the Court asked, "Do counsel desire to take any further exceptions? Mr. Spivok: Nothing so far as plaintiff is concerned" (f 970).

strike the jury panel and who presided on the impanelment of the jury and trial of the case. The motion was fully argued and denied (R 83, 84). The Court rendered an oral opinion. So much of it as deals with the make-up of the jury is printed in the record (R 76-83). The trial judge found that "**five jurors** whose names and occupations I have just mentioned, **belong more closely and intimately with the working man and employee class** than they do with any other class, and * * * when compared with the others, do not belong to the same occupational class as the remaining seven jurors"; that these five "I think it may be clearly supposed would be expected to be sympathetic with the experiences in life, the affairs of life, and with the economic views, of people who belong to the working or employee class." **Three** were specified who "might be termed important business men, having important or leading or outstanding business connections." Of the **remaining four**, the Court said one "was in the insurance business, but I personally did not get the impression he was in a managerial class", one was "a retired commission merchant", but it did not appear "what importance his financial standing or former business may be or may have been", and another was "a rice broker and accountant" and it was impossible from the record to state "the relative importance of his business compared with that of the so-called managerial or employer class of business." The twelfth juror, not mentioned in this oral opinion, was a housewife, Mrs. Goeppner. (See App. B.)

On appeal the Circuit Court of Appeals for the Ninth Circuit affirmed the judgment (R 132-139; 149 F.2d 783).

The cause is here on certiorari "limited to the question whether petitioner's motion to strike the jury panel was properly denied" (R 141).

II.

QUESTIONS PRESENTED

The basic question, whether the trial court erred in denying petitioner's motion to strike out or quash the jury panel, is presented by petitioner's notice of motion filed November 5, 1942 (R 9-11). Its statement of grounds presented questions of law and fact which, it is believed, resolve themselves into one only that merits discussion. The stated grounds (R 10, 11), rearranged, are:

1. The judges of the District Court failed to prescribe any rules of qualification or otherwise for selection of jurors.

2. The judges of the District Court failed to provide necessary facilities or funds for proper investigation of prospective jurors.

3. The selection of jurors "is arbitrary, because no examination whatever is made of said jurors before they are put on said panel to ascertain their qualifications or particularly their unfitness" by reason of connections with or prejudice in favor of "gigantic corporations" like respondent.

4. No effort is made to apportion jurors "by districts" [whatever that may mean].

5. By the acts of the clerk and jury commissioner "which may even appear fair on their face," respondent

has prevailed in every personal injury action for the past nine years, and by reason of that fact it will be impossible for petitioner to prevail and he will be denied trial by an impartial jury.

6. There has been class discrimination in "selecting" jurymen "on said panel" in this:

(a) A larger proportion of men are selected, thus discriminating against women.

(b) There is no effort to proportionately or fairly represent citizens of all races, thus systematically excluding Negroes and Chinese.

(c). Mostly business executives or those having the employer's viewpoint are selected, discriminating against other occupations and classes, particularly employees and poor people, plaintiff was regularly employed as a wage earner, and by consequence he is denied equal protection of the laws.

It is believed that only those grounds grouped under 6 above merit attention. These grounds tender questions both of fact and of law. The questions of fact have been resolved against the petitioner by the tribunal to which is committed the determination of such questions (p. 44 below). The only substantial questions now are: (1) Is there evidence to sustain the finding of the trial court that there was no abuse of discretion by the clerk and the jury commissioner in putting names in the jury box, and that there was no purposeful systematic, or arbitrary exclusion of any class of [illegible]ble persons solely because of membership in that [illegible]s? It will be submitted that there is such evidence. (2) Has petitioner shown that he was prejudiced by any assumed irregularity?

III.

STATUTES

With the exception of "qualifications" and "exemptions" the method by which petit jury panels are gotten up is fixed by Federal statutes. These are set out in Appendix A to this brief, pp. 1 to 8.

By express provision of the Federal statutes (Jud. Cod. §275, 28 U.S.C.A. §411) jurors "in the courts of the United States * * * shall have the same qualifications * * * and * * * exemptions as jurors of the highest court of law" of the state in which the Federal court is sitting. The applicable California statutes are set out in Appendix A, pp. 8 to 12.

There was a time when the Federal courts, by rule or order, if they so desired, could adopt the state practice for preparation of panels. This permissive alternative was eliminated in 1911. State statutes and state practice are now without significance except for qualifications and exemptions. (See Appendix A, pp. 1, 2, note *)

IV.

SUMMARY OF ARGUMENT

The first five grounds of motion to strike the panel are wholly unsubstantial. The first four are fully answered by the plain provision of the Federal statutes. (App. A.) The fifth is immaterial. (See pp. 14-18 below.)

The sixth ground, that there was improper class discrimination by the clerk and jury commissioner in the selection of names to go into the jury box from which the panel was drawn, warrants more detailed considera-

tion, but, on such consideration, is equally unsubstantial.

The doctrine sought to be invoked is an American development of the institution of trial by jury. Its first statement was by this Court in 1880 in *Strauder v. West Virginia*, 100 U. S. 303, 25, L.ed. 664 and two companion cases. In those cases, and in every case in this Court since then, the claim of discrimination arose in a criminal proceeding. In all but two, the claim appealed to a Federal statute which was precise in terms. In the two in which it did not, there was no evidence of any discrimination. From these cases, a generalization, sufficiently broad to cover a civil case in which the claim is of discrimination against a class not defined by statute, can be made only with caution and with due regard for the rule that a judgment will not be reversed unless the appellant sustains the burden of shewing improper conduct which adversely affected his substantial rights.

If the generalization is made, these rules result: The petitioner was not entitled to a particular sort of jury. He had no right of inclusion on the panel of any person or class of persons. All to which he was entitled was a fair and impartial jury drawn from a panel from which no class of eligible persons was excluded systematically, arbitrarily and purposefully solely on account of membership in that class, and prejudice against the class. He is without ground of complaint unless he can show such exclusion was of a class determined by considerations irrelevant to the performance of jury duty and of which he was a member. Even if some class were excluded from the panel, if the exclusion was for justifiable reason,

based on capacity to act or hardship to the community, class or individual, the exclusion was proper.

The function of preparing the sort of panel to which petitioner was entitled was committed to the discretion of the clerk and jury commissioner. All that was required of them was an honest and unbiased effort to prepare such a panel. Whether they properly performed their functions was a question of fact for the trial court. It determined that question against petitioner and its finding is entitled to the same respect as the finding on any other issue of fact committed to the trial court. That finding can be set aside only if it is not supported by evidence. In determining whether the finding is supported it is to be remembered that when the conduct of the clerk and the jury commissioner was presented to the trial court, a presumption of regularity accompanied it, and petitioner had the burden of proving misconduct. Moreover, in this Court, the petitioner has the burden of showing not only misconduct, but misconduct which prejudiced his substantial rights.

In endeavoring to sustain his burden, petitioner can rely only on the showing made by the evidence *ore tenus*. His attorney's affidavit cannot be considered. The petitioner failed to show improper exclusion of any class of eligible persons, systematically, arbitrarily, purposefully or otherwise. He failed to show any prejudice by any assumed exclusion. He failed to show that he was a member of any assumedly excluded class. He failed to show that any assumed exclusion of any class was the result of class prejudice. He failed to show that any persons excluded were such as to make them act differently from

those who were drawn and failed to show that a sufficient number of unexceptional persons were not present.

If it be assumed that the rule developed in the criminal cases is to be extended to cover civil cases, this case is controlled by *Rawlins v. Georgia*, 201 U. S. 638, 50 L.ed. 899 (1906).

V.

ARGUMENT

A. THE FIRST FIVE GROUNDS OF THE MOTION TO STRIKE THE JURY PANEL (AS WE ARRANGE THEM ABOVE) ARE UNSUBSTANTIAL.

The first ground of motion is that the judges of the District Court failed to prescribe "any rules of qualification or otherwise for selection" of jury panels. District judges are neither required nor permitted to prescribe such rules. Congress has done this. (See App. A, pp. 1-8) The qualifications of jurors are those for "jurors of the highest court of law" of the state in which the District Court is sitting. (Jud. Cod. §275, 28 U.S.C.A. §411, App. A, p. 1) The other rules "for selection" of names for the jury panel,—the machinery for putting names into a jury box which shall contain not less than 300 names from which the panel shall be drawn by lot,—have been directly prescribed by Congress itself. The names are to be placed in a box by the clerk of the District Court, or a duly qualified deputy clerk, and a commissioner to be appointed by the senior District Judge. (Jud. Cod. §276, 28 U.S.C.A. §412, App. A, pp. 1-3) Determination of names to go into the jury box is committed to the discretion of the clerk and jury commissioner. (See p. 38 et seq. below.)

The second ground is that the District Judges failed to provide "necessary facilities or funds to permit proper investigation of prospective jurors." The statutes neither require nor authorize District Judges to provide "facilities or funds." Evidently petitioner had in mind "facilities and funds" to permit the clerk and jury commissioner to make investigations. If such facilities and funds are to be provided, Congress must do it. At present neither the clerk nor the jury commissioner is required to make such investigation. This investigation is made by the court itself, after the names have been drawn and the prospective jurors have been summoned by the marshal. Compare the testimony of Mr. Calbraith, then deputy clerk (R 52-59, esp. 52, 53, 55), and of the clerk, Mr. Maling (R 38, 39). Not only is there no requirement of examination for qualifications before the names are drawn from the box, but the determination of qualifications is a judicial matter. It is a function of the court. The function of the clerk and jury commissioner is to submit names to the court (by putting them into the box for drawing), for testing by the court.[12]

This disposes of the **third ground**, that there was no examination of prospective jurors "before they are put on said panel to ascertain their qualifications." No such examination by the clerk or jury commissioner is contemplated by the statute. There was in fact such an examination by the Court before the names were "put on said panel." Indeed, the statute does not require examination even by the court before the names are put on the panel.

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12. No process is provided for the clerk or jury commissioner, —they have no power of subpoena. (See *United States v. Rondeau*, 16 F. 109, 111 (C.C. La. 1883).)

Examination, as a matter of practice, could be postponed until impanelment of a jury for a particular case. It can be done then. One of the purposes of the voir dire is to examine qualifications.[13]

Reynolds v. United States, 98 U.S. 145, 25 L.ed 244 (1879);

State v. Lloyd, 138 Wash. 8, 244 Pac. 130 (1926).

The fourth ground is that there was no effort to apportion jurors by districts. Evidently what was meant was that there was no effort to draw the prospective jurors from the whole of the Northern District of California. There was no such requirement.[15] The statute (Jud. Cod. §277, 28 U.S.C.A. §413, App. A, pp. 3, 4) is explicit. "Jurors shall be returned from such parts of the district * * * as the court shall direct * * * so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district."[16] The Court can "draw and summon

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13. Compare the statutory provision for returning "jurymen from the bystanders" when the panel is exhausted (Jud. Cod. §280, 28 U.S.C.A., §417, App. A, p. 6). There can be no examination until the name of such prospective juror is called on impanelment of the petit jury.

14. Compare note 41 below. See *Vega v. Evans*, 128 Ohio St. 535, 191 N.E. 757, syl. 1, by the Court (1934); *Sherman v. William M. Ryan & Sons*, 126 Conn. 574, 13 A.2d 134 (1940).

15. Even the provisions of Cal. C.C.P., §206 (which do not apply in the Federal court), that names shall be selected from different wards or townships in proportion to population, "is directory only." (*People v. Tenant*, 32 C.A.2d 1, 8, 88 P.2d 907 (1939,—hr. by Supreme Ct. den. 1939). Cf. *People v. Corder*, 306 Ill. 264, 137 N.E. 845, 849 (1922).)

16. Without express statutory provision it would be proper to restrict those summoned to persons residing within convenient travel distance of court. (*People v. Patterson*, 58 C.A.2d 837, 843, 138 P.2d 341 (1943); *Blakey v. Commonwealth*, 182 Va. 614,

jurors from the entire district" but "it was not necessary, however, that this be done." (*Lewis v. United States*, 279 U. S. 63, 72, 73 L.ed. 615, 619 (1929). Acc., *Agnew v. United States*, 165 U. S. 36, 42, 41 L.ed. 624, 626 (1897);[17] *Rathenberg v. United States*, 245 U. S. 480, 482, 62 L.ed. 414, 418 (1918).[18])[19]

The Northern District of California extends from San Luis Obispo to the Oregon line (655 railroad miles) and from the Pacific Ocean to the Nevada line (229 railroad miles). Selection of jurors to sit in San Francisco was necessarily limited to those within travel distance, commuting distance,—of San Francisco. The evidence shows that on instructions from the Court, the clerk and jury commissioner restricted names put in the jury box to those of people who lived within commuting distance of the court, but that within this area, there was no discrimination against any locality (R 34, 41, 46, 50).[20]

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29 S.E.2d 863, 865 (1944). Compare the remarks of District Judge Knox, chairman of the committee of District Judges appointed to study the problem of obtaining proper jurors, to the Denver Bar Association, 21 *Dicta* 283, 287 (1944), his committee's report to the Judicial Conference (Sept. 1942), and the testimony before the House Judiciary Committee on June 12 and 13, 1945, on hearings on H.R. 3379, 3380, 3381.

17. The court ordered a special venire to issue for ten grand jurors to be drawn, all to come from a single county within the district.

18. The court rejected any argument like petitioner's; said the argument disregarded the plain language of Amendment VI, the contemporary construction put on it by the Judiciary Act of 1789 "and the continuous legislative and judicial practice from the beginning."

19. For cases from lower Federal courts, see App. A, p. 3, note 6. See, also, note 74, below.

20. The clerk testified that he paid no attention to the part of the district from which the jurymen came (R 34);—and, of course, he then could not, and did not, discriminate against any part of the district,—except that on instructions from the Court,

The fifth ground is that respondent prevailed in every personal injury case tried by jury in the Federal court in the last nine years. The fact is immaterial. There was no claim, nor was there any attempt to show, nor was there any evidence remotely tending to show, that these cases were won because of any improper conduct, any improper influence with the juries, any connection with the selection or method of selection of names for the jury panel, or any bias on the part of jurors. The trial court put its finger on the explanation when counsel for respondent was testifying: "The Court: Q: Did you ever settle a case? A: A great many" (R 66, 67).

B. THERE WAS NO IMPROPER EXCLUSION OF ANY CLASS OF ELIGIBLE PERSON.

The last ground of motion is that there was an improper discrimination against classes of eligible persons by the clerk and jury commissioner in selecting names for the jury box. To frame properly the question and point the discussion it seems advisable first to deal with some legal considerations involved.

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he did not go beyond San Jose on the one hand and San Rafael on the other (R 41); that he did not endeavor to work out exact mathematical percentages for each precinct within travel distance of San Francisco, but that he never purposely excluded any resident of any city or town or part of a city or town (R 41).

The jury commissioner testified that his practice was like the clerk's (R 46); that he never purposely excluded any area in San Francisco or its vicinity or in the district within travel distance of the Court; that he endeavored to get people who were within traveling distance of the Court (R 59).

Compare note 15 above.

I. Development of the General Principle That in Preparing Jury Lists Class Prejudice Shall Not Be Permitted to Work a Systematic and Purposeful Discrimination Against Any Class of Eligible Person.

We assume for the moment that the principles and rules of the decisions in criminal cases dealing with claims of purposeful discrimination against negroes, by excluding them from jury lists because of "race or color,"[21] are to be applied in civil cases and extended to classes beyond the class for whose protection the 13th, 14th, and 15th Amendments were primarily designed,[22] and beyond those

21. The cases in this Court dealing with claims of exclusion of qualified and non-exempt persons from jury lists because they were members of a class, are criminal cases and cases dealing with claimed exclusion of colored citizens, except four: (1) *Jugiro v. Brush*, 140 U.S. 291, 35 L.ed. 510 (1891), where an alien Jap claimed exclusion of his race, which, if made out in fact, would have been a violation of the Act of March 1, 1875 (8 U.S.C.A. §44), which applies to State and Federal agencies and prohibits discrimination "on account of race, color, or previous condition of servitude"; (2) *Rawlins v. Georgia*, 201 U.S. 638, 50 L.ed. 899 (1906), where objection was made to occupational exclusions; (3) *Ruthenberg v. United States*, 245 U.S. 480, 62 L.ed. 414 (1918), where the claim was exclusion in a Federal court of a class determined by political affiliations which, if made out, was a violation of the Act of June 30, 1879, as amended, and carried into the Judicial Code, §276 (28 U.S.C.A. §412, App. A, p. 3); (4) *Glasser v. United States*, 315 U.S. 60, 86 L.ed. 680 (1942), where the claim was of improper exclusion of women and selection of women from the membership of a private organization.

22. In *Gibson v. Missouri*, 162 U.S. 565, 580, 40 L.ed. 1075, 1078, this Court cited the earlier cases dealing with the exclusion of negroes, the Act of March 1, 1875 (App. A, p. 4), and the removal statute, R.S. §641, and said: "The cases cited were held to have decided that the statutory enactments referred to were Constitutional exertions of power of Congress to enact appropriate legislation for the enforcement of the provisions of the 14th Amendment which was designed, primarily, to secure the colored race, thereby invested with the rights, privileges and responsibilities of citizenship, the enjoyment of all the civil rights that, under the law, are enjoyed by white persons; * * *." The rest of the passage is quoted at p. 25 below.

classes specified in Federal statutes.[23] The main body of principles and rules dealing with claims of improper exclusion from jury lists was worked out in five cases decided from 1880 to 1883:

Strauder v. West Virginia, 100 U.S. 303, 25 L.ed. 664 (1880);

Virginia v. Rives, 100 U.S. 313, 25 L.ed. 667 (1880);

Ex Parte Virginia, 100 U.S. 339, 25 L.ed. 676 (1880);

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23. We are not here concerned with the special statutes disqualifying jurors who have served within a year and certain persons in bigamy and related cases, and exempting workers in United States Arsenals. Passing these there are four Federal statutes having bearing.

Judicial Code, §275 (28 U.S.C.A., §411) refers the general "qualifications" and "exemptions" of jurors to state law providing that for jurors in courts of the United States they shall be the same as for jurors for the highest court of law in the state.

Section 4 of the Act of March 1, 1875, 8 U.S.C.A., §44, provides that no citizen shall be disqualified for jury service "in any court of the United States, or of any state on account of race, color, or previous condition of servitude." Judicial Code, §278, 28 U.S.C.A., §415, is to the same effect, but is restricted in operation to courts of the United States.

Judicial Code, §276, 28 U.S.C.A., §412, provides that the clerk and jury commissioner shall place names in the jury box "without reference to party affiliations." This provision originated in the Act of June 30, 1879.

For the history of the statutes see App. A, pp. 4, 5, note 7.

Before 1875 there is no reference in any Federal statute (as to state statutes see App. A, p. 5, note 7), nor, so far as we are aware, is there any Federal decision (certainly none of this Court), touching on exclusion of general classes from jury service. The first statute expressly referring to jurors is the Act of March 1, 1875 (see App. A, pp. 4, 5, note 7), which applies to both state and Federal courts and deals only with classification on the basis of "race, color, or previous conditions of servitude." The first reference to party affiliation as a possible line that might be drawn in making arbitrary exclusions, is in the Act of June 30, 1879, c. 52, §2, 21 Stat. 43 (Jud. Cod., §276, 28 U.S.C.A., §412, App. A, p. 3). There are no decisions of this Court dealing with any claimed exclusion to which one or the other of these statutes did not apply except *Rawlins v. Georgia*, 201 U.S. 638, 50 L.ed. 899 (1906) and *Glasser v. United States*, 315 U.S. 60, 86 L.ed. 680 (1942). See note 21 above and p. 54 et seq. below.

Neal v. Delaware, 103 U.S. 370, 26 L.ed. 567 (1881);
Bush v. Kentucky, 103 U.S. 110, 27 L.ed. 354 (1883).

The *Strauder Case* held that a statute restricting jurors to "white male persons" denied to a negro "equal protection of the laws" in violation of the 14th Amendment, and that it was error to deny a petition to remove under R. S. §641 and a motion to quash the venire.[24]

In the *Rives Case mandamus* required remand of prisoners to the state court because the state **statute** providing for jury service by "all male citizens" did not deny to the prisoners any civil rights and discrimination by state **officers**, in getting up jury panels, did not warrant removal under R. S. §641.[25]

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24. The Court states the question to be whether the defendant was entitled to "a jury selected and empanelled without discrimination against his race or color, because of race or color"; **not** whether he was entitled to have the jury "composed in whole or in part of persons of his own race or color" but "whether, in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that **by no possibility** can any colored man sit upon the jury." In the course of the opinion it was said that the whole idea of a jury is that of "persons having the same **legal** *status* in society as" the defendant. The case is turned on the 14th Amendment. The Civil Rights Bill of April 9, 1866, is quoted as a partial enumeration of the rights and immunities intended to be guaranteed by the Constitution. No reference is made to §4 of the Civil Rights Act of March 1, 1875, but it is referred to in the other cases decided the **same day**.

25. It was said that if the officer charged with the selection of persons from whom the juries would be drawn "confined his selection to white persons, and refused to select any persons of the colored race, solely because of their color, his action was a gross violation of the spirit of the state law, as well as of the Act of Congress of March 1, 1875, 18 Stat. at L., 335, which prohibits and punishes such discrimination," but that assertions that the grand and petit juries "were composed wholly of the white race" and that members of the colored race had never been allowed to serve "fall short of showing that any civil right was denied,

In *Ex Parte Virginia, habeas corpus* was denied to a state officer indicted for violation of §4 of the Act of Mar. 1, 1875 (8 U.S.C.A. §44, App. A, p. 4)[26] by excluding colored citizens from the jury lists on account of their race, color, and previous condition of servitude. The statute so applied was sustained.[27]

The *Neal Case* held that removal to the Federal court for exclusion of colored citizens from the jury list was properly denied, because though the Delaware statutes excluded them those statutes were repealed by the amend-

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or that there had been any discrimination against the defendants because of their color or race. The facts may have been as stated, and yet the jury which indicted them, and the panel summoned to try them, may have been impartially selected." Defendants had asked for inclusion of a definite proportion of Negroes, one-third. "The privilege for which they moved and which they also asked from the prosecution was not a right given or secured to them or to any person, by the law of the State, or by any Act of Congress, or by the 14th Amendment of the Constitution. It is a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them because of their color. But this is a different thing from the right which is asserted was denied to the petitioners by the state court, viz.: a right to have the jury composed in part of colored men. A mixed jury in a particular case is not essential to the equal protection of the laws, and the right to it is not given by any law of Virginia, or by any Federal statute."

For a review of the cases on the right to remove see *Kentucky v. Powers*, 201 U.S. 1, 50 L.ed. 633 (1906).

26. For the history of the Federal statutes see App. A, p. 4, note 7.

27. The purposes of the 14th Amendment are pointed out and it is said that "power was given to Congress to *enforce* its provisions by appropriate legislation. Such legislation must act upon persons, not upon the abstract things denominated State, but upon the persons who are the agents of the State in the denial of the rights which were intended to be secured. Such is the Act of March 1, 1875, 18 Stat. at L. 336, and we think it was fully authorized by the Constitution."

ments to the Constitution and the Act of March 1, 1875.[28] The conviction was reversed, however, for improper denial of challenges to juries drawn from lists from which state officials had systematically and intentionally excluded all colored citizens.[29]

The *Bush Case* reversed a conviction because the grand jury was organized under a Kentucky statute, adopted after the 14th Amendment, which restricted jurors to "white citizens," and was organized before the holding in *Commonwealth v. Johnson*, 78 Ky. 511, that the limiting word "white" was improper. The petit jury was not subject to the same attack, however, and a motion to set aside the panel of petit jurors was properly denied, although there were no members of the defendant's race on the panel.[30]

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28. The Court quotes from the Civil Rights Bill of April 9, 1866 and §4 of the Civil Rights Act of March 1, 1875 and states that in the three decisions of 1880, the constitutionality of these statutes was sustained. It then uses substantially the language quoted from *Gibson v. Mississippi* below at p. 25.

29. Although the questions could not be raised on petition for removal, they could be reviewed on writ of error. The Court said, referring to *Virginia v. Rives*, note 25 above: "We repeat what was said in that case, that while a colored citizen, party to a trial involving his life, liberty or property, cannot claim, as matter of right that his race shall have a representation on the jury, and while a mixed jury in a particular case, is not within the meaning of the Constitution, always or absolutely necessary to the equal protection of the laws, it is a right to which he is entitled, 'That in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race and no discrimination against them, because of their color.' So that we need only inquire whether, upon the showing made by the accused, the court erred in overruling the motions to quash the indictment and the panels of jurors." See this quoted with approval in *Wood v. Brush*, 140 U.S. 278, 285, 35 L.ed. 505, 508 (1891).

30. The order to the sheriff to summon the petit jury directed him to "proceed in his selection without regard to race, color or

The result of these cases was summarized by this Court in 1896[31] in *Gibson v. Mississippi*, 162 U.S. 565, 40 L.ed. 1075.[32] The earlier cases and the Act of March 1, 1875 (8 U.S.C.A. §44) are referred to. It is said that the cases decided that the statute was enacted under power to enforce the 14th Amendment "which was designed primarily, to secure to the colored race, thereby invested with the rights, privileges and responsibility of citizenship," the enjoyment of civil rights enjoyed by white persons[33] and the court adds

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previous condition of servitude." The motion to set aside the petit jury panel was properly overruled "for the reason, amongst others, that the grounds upon which it was rested do not clearly and distinctly show that the officers who selected and summoned the petit jurors excluded from the panel qualified citizens of African descent *because of their race or color*." It may be that only white citizens were selected, but it would not follow that the officer violated the law and special instructions. (See note 64 below.) "There was no legal right in the accused, to a jury composed in part of his own race. All that he could rightfully demand was a jury from which his race was not excluded *because of their color*. *Virginia v. Rives*, supra. The allegation, that colored citizens were excluded and that only white citizens were selected, was too vague and indefinite to constitute the basis of an inquiry by the court whether the sheriff had not disobeyed its order by summoning and selecting jurors with intent to discriminate against the race of the accused." (Italics those of the Court.)

31. Two intervening decisions, affirming convictions and holding that there was no improper exclusion because of race or color, add nothing to the statement of the doctrine. *Wood v. Brush*, 140 U.S. 278, 35 L.ed. 505 (1891), states the doctrine by quotation from *Neal v. Delaware*, supra and *Jugiro v. Brush*, 140 U.S. 291, 35 L.ed. 510 (1891), holds that the objections "are substantially disposed of by the decision in *Wood v. Brush*, just rendered."

32. Followed in *Smith v. Mississippi*, 162 U.S. 592, 40 L.ed. 1082 (1896) and *Murray v. Louisiana*, 163 U.S. 101, 41 L.ed. 87 (1896), affirming convictions and holding petitions for removal were properly denied.

33. See note 22 above for the language of the Court.

"that while a state, consistently with the purposes for which the amendment was adopted, may confine the selection of jurors to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications, and while a mixed jury in a particular case is not, within the meaning of the Constitution, always or absolutely necessary to the enjoyment of the equal protection of the laws, and therefore an accused, being of the colored race, cannot claim as matter of right that his race shall be represented on the jury, yet[34] a denial to citizens of the African race, *because of their color*, of the right or privilege accorded to white citizens of participating as jurors in the administration of justice would be a discrimination against the former inconsistent with the amendment and within the power of Congress, by appropriate legislation, to prevent: that to compel a colored man to submit to a trial before a jury drawn from a panel from which were excluded, *because of their color*, men of his race, however well qualified by education and character to discharge the functions of jurors, was a denial of the equal protection of the laws: and that such exclusion of the black race from juries because of their color was not less forbidden by law than would be the exclusion from juries, in states where the blacks have the majority, of the white race because of *their* color." (Italics by the Court.)

Later cases have added little and have hardly varied the form of expression. *Carter v. Texas*, 177 U.S. 442,

34. The language in this quotation comes from *Neal v. Delaware* (see note 28 above) with the addition of the language beginning "and while a mixed jury" and ending with the footnote reference for this footnote.

44 L.ed. 839 (1900), citing the *Strauder*, *Neal* and *Gibson Cases*, stated the rule that equal protection of the laws was denied a colored defendant where "all persons of the African race were excluded, solely because of [illegible] race or color." Its statement was adopted by quotation in *Norris v. Alabama*, 294 U.S. 587, 79 L.ed. 1074 (1935), the court adding that "this statement was repeated in the same terms in *Rogers v. Alabama*, 192 U.S. 226, 231, 48 L.ed. 417, 419, 24 S.Ct. 257,[35] and again in *Martin v. Texas*, 200 U.S. 316, 319, 50 L.ed. 497, 498, 26 S.Ct. 338."[36]

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35. *Franklin v. South Carolina*, 218 U.S. 161, 167, 54 L.ed. 980, 985 (1910), said the appropriate rule is that laid down in *Carter* and *Rogers Cases* and held that there was no improper discrimination within the rule of those cases.

36. The *Martin Case* held that the claim made was not made out for want of proof; that a different conclusion in this case would mean that "an allegation of discrimination against the African race because of their race could be established by simply proving that no one of that race was on the grand jury that returned the indictment, or on the petit jury that tried the accused, whereas a mixed jury, some of which shall be of the same race with the accused, cannot be demanded, as of right, in any case; nor is a jury of that character guaranteed by the 14th Amendment. What an accused is entitled to demand, under the Constitution of the United States, is, that, in organizing the grand jury as well as in the impaneling of the petit jury, there shall be no exclusion of his race and no discrimination against them, because of their race or color."

The *Martin Case* is quoted and followed in *Thomas v. Texas*, 212 U.S. 278, 282, 53 L.ed. 512, 514 (1909) and the Court quoted from the opinion of the court below to the effect that want of full *pro rata* representation would not be evidence of discrimination and that there was no violation of the Constitution if the jury commissioners "fairly and honestly endeavored to discharge their duty, and did not in fact discriminate against the negro race in their selection of the jury lists."

The *Martin Case* and the *Thomas Case* were cited and applied in *Ruthenberg v. United States*, 245 U.S. 480, 482, 62 L.ed. 414, 418 (1918), a case coming up from a United States District Court, where it was said that these cases demonstrated "the want of merit in the proposition that constitutional or statutory rights were denied the plaintiffs in error, who were Socialists, because the grand and trial juries were composed exclusively of members of other political parties and of property owners."

Hale v. Kentucky, 303 U.S. 613, 616, 82 Led. 1050, 1052 (1938), reversed a conviction because the uncontroverted proof showed "a systematic and arbitrary exclusion of negroes from the jury lists solely because of their race and color." *Smith v. Texas*, 311 U.S. 128, 129, 85 Led. 84, 86 (1940) uses the expressions "intentionally and systematically excluded from grand jury service solely on account of their race and color."[37] *Glasser v. United States*, 315 U.S. 60, 86, 86 Led. 680, 707 (1942) reh. den. 315 U.S. 827, 86 Led. 1222, in a dictum, condemned "deliberate selection of jurors from the membership of particular private organizations."[38] *Hill v. Texas*, 316 U.S. 400, 86 Led. 1559 (1942) speaks of the problem as one "of racial discrimination," and rests heavily on *Neal v. Delaware* and §4 of the Civil Rights Act of March 1, 1875 (8 U.S.C.A. §44). In the last decision, *Akins v. Texas*, Oct. Term, 1944, No. 853 U.S. , 89 Led. (Adv. Op.) 1296, 65 Sup. Ct. Rep. 1279 (1945), the court uses the language "arbitrary and purposeful limitation," "purposeful discrimination," "deliberately and intentionally limited," and says that "a purpose to discriminate must be present."

With these cases in mind, the applicable general principles and rules are not difficult of statement:

The 7th Amendment guarantees to litigants in Federal courts "the basic institution of jury trial in only its

37. The Court holds that "racial discrimination" violates the Constitution "and the laws enacted under it" and for this last quotes in a note §4 of the Civil Rights Act of March 1, 1875 (8 U.S.C.A. §44).

38. The actual holding was that the claim of improper selection was not made out.

most fundamental elements", (*Galloway v. United States*, 319 U.S. 372, 390, 87 L.ed. 1458, 1471 (1943), reh. den. 320 U.S. 214, 87 L.ed. 1851; *United States v. Wood*, 299 U.S. 123, 81 L.ed. 78 (1936) reh. den. 299 U.S. 624, 81 L.ed. 459), as those elements were developed at the common law (*Capital Traction Co. v. Hof*, 174 U.S. 1, 43 L.ed. 873 (1899); *Thompson v. Utah*, 170 U.S. 343, 42 L.ed. 1061 (1898)), with liberty to adjust details to make them congenial to the environment (*Galloway* and *Wood Cases*; *State v. Mercier*, 98 Vt. 368, 127 A. 715 (1925)). The procedure developed was "not to enable the" party "to select jurors, but to secure an impartial jury." The Constitutional right was maintained, and a party had no cause of complaint if his case was tried by a fair and impartial jury. (*Brown v. New Jersey*, 175 U.S. 172, 175, 44 L.ed. 119, 121;[39] *Howard v. Kentucky*, 200 U.S. 164, 50 L.ed. 425 (1906); *Ex parte Spies*, 123 U.S. 131, 168, 31 L.ed. 80, 87 (1887); *Virginia v. Rives*, note 25 above.)[40] He had such a jury if it was drawn from a list so selected that the list could be said to be fairly representative of the com-

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39. This case held that in a prosecution for murder the jury might be selected from a special list,—might be a so-called "struck jury."

40. The Court said in *People v. Parman*, 14 C.2d 17, 92 P.2d 387 (1939), quoting from *People v. Shannon*, 203 Cal. 139, 142, 263 Pac. 522 (1928), which in turn relied on *Brown v. New Jersey*, supra: "Assuming, however, that the point is properly before us, there is nothing in the state or Federal constitutions, or any statute, which guarantees one accused of a crime a trial by a jury composed of men and women or of only men or of only women or of any definite proportion of either sex. His right is to a fair and impartial jury, and not to a jury composed of any particular individuals. He cannot complain if he is tried by an impartial jury, and can demand nothing more."

munity[41] (*Glasser v. United States*, 315 U.S. 60, 86 L.ed. 680 reh. den. 315 U.S. 827, 86 L.ed. 1222 (1942); *Smith v. Texas*, 311 U.S. 128, 85 L.ed. 84 (1940)). It was representative of the community,[42] even if some classes were excluded, provided "the exclusion was not the result of race or class prejudice," the persons excluded were not such as "to make them act otherwise than those who were drawn would act" and "a sufficient number of unexceptional persons were present."[43] (*Ballins v.*

41. Against bias or other disqualification of a particular juryman he was protected by challenge to the polls. *Aldridge v. United States*, 283 U.S. 308, 75 L.ed. 1054 (1931—class prejudice is a proper matter for inquiry on the voir dire examination); *United States v. Wood*, 299 U.S. 123, 81 L.ed. 78 (1936), reh. den. 299 U.S. 624, 81 L.ed. 459; *State v. Brooks*, 57 Mont. 480, 188 P. 942 (1920—prejudice against I.W.W.). See note 14 above and cases in the body at that point.

42. And "community" must be understood to mean only those "citizens" of proper age who have their "natural faculties" and "ordinary intelligence," are "not decrepit," are "of **fair character** and **approved integrity**, and of **sound judgment**" and have not been "convicted of malfeasance in office or any felony or other high crime." (Cal. C.C.P. §§198, 199, 205; App. A, p. 8 et seq.)

43. In *United States v. Wood*, above, this Court said: "**Impartiality is not a technical conception. It is a state of mind.** For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula. State courts enforcing similar requirements of state constitutions as to trial by jury have held that the legislatures enjoy a reasonable freedom in establishing qualifications for jury service, although these involve a departure from common-law rules. This principle was thus stated by the Court of Appeals of New York in *Stokes v. People*, 53 N.Y. 164, 173, 13 Am. Rep. 492: 'While the Constitution secures the right of trial by an impartial jury, the mode of procuring and impanelling such jury is regulated by law, either common or statutory, principally the latter, and it is within the power of the legislature to make, from time to time, such changes in the law as it may deem expedient, taking care to preserve the right of trial by an impartial jury.'" *Brown v. State*, 62 N.J.L. 666, 678, 42 A. 811, is quoted to like effect.

Georgia, 201 U.S. 638, 640, 50 L.ed. 899, 900 (1906); *People v. Prior*, 294 N.Y. 405, 63 N.E. 2d 8, 11 (1945).[44]

This goes beyond the common law. At common law, the array was not subject to challenge so long as the officer who prepared it (at common law the sheriff) stood indifferently as to the parties and issues.[45]

Our peculiarly American development[46] came in criminal cases under the 14th Amendment and the Acts of 1875 (8 U.S.C.A. §44) and 1879 (Jud. Cod. §276, 28 U.S.C.A. §412). (See note 23.) If it is to be generalized beyond its statutory basis and the actual holdings of the cases that developed it,[46] it can fairly be stated to be this: A party entitled to a trial by jury is entitled to have the list from which the jurors will be drawn so prepared that class prejudice has not worked a **systematic, arbitrary** and **purposeful** discrimination against and exclusion of fellow members of a class determined by race, color, party affiliation, or other consideration irrelevant to the performance of a high duty of citizenship and such that the

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44. Compare *People v. Arceo*, 32 Cal. 40, 45 (1867), quoting Mr. Justice Storey's opinion in *United States v. Cornell*, 2 Mason 91, Fed. Cas. No. 14,868 (1820); *Shettel v. United States*, 113 F.2d 34 (C.A. for Dist.Col.,—1940), quoting the *Cornell Case* in note 11.

45. See 3 *Bl. Com.*, 359; 2 *Comyns, Digest*, 3 ed., 200 (Challenge, (B) Challenge to the Array); 19 *Halsbury's Laws of England*, 2 ed., 303 (Title Juries, par. 631); *Proffatt, Jury Trial* (1880), §149 et seq.; *Thompson & Merriam, Juries* (1882), §126. The total absence of discussion of the question in the case at bar in *Proffatt*, and the almost casual reference to the decisions of this Court of 1880 and 1881 in *Thompson & Merriam*, speak volumes.

46. See notes 21 and 23 above. Such a generalization must be made and used with caution. If it is proper, how it shall be framed to describe classes not selected by the legislature in prohibiting discrimination, involves various considerations, some of which are discussed below at pp. 50-57.

exclusion will, or might reasonably be expected to, reflect itself in the jury's determination,[47] **solely because of membership in that class.**

Strauder v. West Virginia, note 24 above;
Virginia v. Rives, note 25 above;
Neal v. Delaware, note 29 above;
Bush v. Kentucky, note 30 above;
Gibson v. Mississippi, page 24 above;
Rawlins v. Georgia, note 57 below;
Martin v. Texas, note 36 above;
Thomas v. Texas, note 36 above;
Hale v. Kentucky, page 27 above;
Smith v. Texas, page 27 above;
Glasser v. United States, page 27 above;[48]
Akins v. Texas, page 27 above.[49]

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47. If the exclusion is "the result of race or class prejudice" (*Rawlins v. Georgia*, supra) it is fair, perhaps, to assume that the prejudice is reciprocal and may reflect itself in the jury's determination of a criminal case.

But it is equally fair to say that an exclusion would not so reflect itself in a civil action where neither party is a member of the excluded class and the issues to be tried are not of the sort to make an appeal to the assumed prejudices of the excluded class. Cf. *Thiede v. Utah*, 159 U.S. 510, 40 L.ed. 237 (1895); *Agnew v. United States*, 165 U.S. 36, 41 L.ed. 624 (1897); *Ex parte Spies*, 123 U.S. 131, 31 L.ed. 80 (1887); *Lang v. New Jersey*, 209 U.S. 467, 52 L.ed. 894 (1908); *In re Housing Authority*, 126 N.J.L. 60, 17 A.2d 812 (1941). We shall return to this. See p. 50 et seq. below.

48. Illinois statutes providing for women jurors became effective July 1, 1939. The county boards were slow in getting women on their jury lists. In such circumstances, it was not error to omit women from the Federal jury lists, where they were excluded but not solely because they were women. Cf. *People v. Shannon*, 203 Cal. 139, 263 Pac. 522 (1928), where the reason for exclusion of women was that the county courthouse did not have accommodations for a jury of two sexes. The later case of *People v. Parman*, 14 C.2d 17, 92 P.2d 387 (1939), indicates, however, that under the law of California, the jury lists may be restricted to men. See notes 54 and 90.

49. Acc., *Wong Yim v. United States*, 118 F.2d 667 (C.C.A. 9,—1941—cert. den. 313 U.S. 589, 85 L.ed. 1544); *Beckett v. United States*, 84 F.2d 731 (C.C.A. 6,—1936).

The right is **not** of **inclusion** on the jury list of any particular person or class, or to a particular sort of jury. The right is only that there shall be no **systematic, purposeful, and arbitrary exclusion** of qualified and non-exempt persons **solely because of membership** in a class determined by prejudice and irrelevant considerations. If a class is determined by reasons relevant to the performance of jury duty,[50] its exclusion, based on justifiable demands of individuals or the community, and not on class prejudice, is permissible. Traditionally people, individually and by classes, have been excluded (disqualified, exempted, or excused)[51] on the basis of considerations thought to affect their capacity to act as jurors[52] or

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50. Legal status (citizenship, conviction of felony, etc.), capacity in fact, hardship, etc.

51. *Rawlins v. Georgia*, 201 U.S. 638, 640, 50 L.ed. 899, 900 (1906); 3 *Bl. Com.* 364; 2 *Comyn's Digest*, 3 ed. (1792) 139, Challenge (A. 4). See notes 52-57 below. Compare the practice outlined in *United States v. Brady*, 47 F.Supp. 362 (1942), aff'd 133 F.2d 476 (C.C.A. 4, 1943—cert. den. 319 U.S. 746, 87 L.ed. 1702, reh. den. 319 U.S. 784, 87 L.ed. 1727). Property qualifications are of old standing. There was such a qualification in California up to 1915. (See App. A, p. 8, note 10.)

See 5 *Holdsworth, History of English Law*, 186-190.

52. See California Statutes, App. A, p. 8; *Thompson & Merriam, Juries* (1882), §§21-26; *Proffatt, Jury Trial* (1880), §114 et seq. See Judge Knox's summary in his address to the Denver Bar Association, Oct. 16, 1944, 21 *Dicta* 283, 286 and Report to the Judicial Conference of the Committee on Selection of Jurors [Knox Committee], September 1942, p. 33 et seq. The New York qualifications of 1882 are set out in *Wood v. Brush*, 140 U.S. 278, 284, 35 L.ed. 505, 508 (1891). Compare the Mississippi requirements of ability "to read and write" and "good intelligence, fair character and sound judgment" noticed in *Smith v. Mississippi*, 162 U.S. 592, 594, 40 L.ed. 1082, 1083 (1896), the Delaware specification "sober and judicious" and exemptions noticed in *Neal v. Delaware*, 103 U.S. 370, 389, 26 L.ed. 567, 571 (1881), and the Texas statute quoted in note 3 of *Akins v. Texas*, Oct. Term, 1944, No. 853 ..... U.S. ....., 89 L.ed. (Adv. Op.) 1206, 1209, 65 Sup. Ct. Rep. 1279 (1945).

considerations of hardship or grave inconvenience to the community, class or individual.[53] It has never been thought that the rule forbidding discriminatory exclusion because of class prejudice prevented those charged with determining the method of preparing the jury list, or preparing it, from excluding persons, individually or by classes determined rationally and not by prejudice, so long as the process was reasonably calculated to produce a fair and impartial jury.[54]

Strauder v. West Virginia, 100 U.S. 303, 25 L.ed. 664, 666 (1880);[55]

Neal v. Delaware, 103 U.S. 370, 386, 26 L.ed. 567, 570 (1881);

Gibson v. Mississippi, page 24 above;

Jugiro v. Brush, 140 U.S. 291, 297, 35 L.ed. 510, 513 (1891);[56]

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53. See note 52 above. Cal. C.C.P. §200, App. A, p. 9; *Thompson & Merriam, Juries* (1882), §§34-38; *Proffatt, Jury Trial* (1880), §119, et seq.; *Rawlins v. Georgia*, note 51 above; *Neal v. Delaware*, note 52 above.

54. The Nineteenth Amendment does not compel the states to make women eligible. *Comm. v. Welosky*, 276 Mass. 398, 177 N.E. 656 (1931), cert. den. 284 U.S. 684, 76 L.ed. 578.

55. "We do not say that, within the limits from which it is not excluded by the Amendment, a state may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having certain qualifications. We do not believe the 14th Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color. * * * We are not now called upon to affirm or deny that it had other purposes."

56. "It rests with each State to prescribe such qualifications as it deems proper for jurymen, taking care only that no discrimination, in respect to such service, be made against any class of citizens solely because of their race."

Rawlins v. Georgia, 201 U.S. 638, 640, 50 L.ed. 899, 900 (1906);[57]

United States v. Wood, note 43 above.

Cf. *Kohl v. Lehlback*, 160 U.S. 293, 299, 40 L.ed. 432, 434 (1895).

2. Subsidiary Working Rules Developed from the General Principle That There Shall Be No Discrimination Because of Class Prejudice.

From the general principles some precise working rules have developed.

"A mixed jury, some of which shall be of the same race with the" party "cannot be demanded, as of right, in any case." (*Martin v. Texas*, supra.) There is no right to have on the list or jury **any** member of the class to which the challenging party claims to belong.

Virginia v. Rives, note 25 above;

Neal v. Delaware, note 29 above;

Bush v. Kentucky, note 30 above;

Wood v. Brush, 140 U.S. 278, 285, 35 L.ed. 505, 508 (1891);

Jugiro v. Brush, 140 U.S. 291, 35 L.ed. 510 (1891);

Gibson v. Mississippi, p. 24 above;

Martin v. Texas, note 36 above;

Thomas v. Texas, 212 U.S. 278, 282, 53 L.ed. 512, 514 (1909);

Akins v. Texas, supra.[58]

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57. "But if the state law itself should exclude certain classes on the bona fide ground that it was for the good of the community that their regular work should not be interrupted, there is nothing in the 14th Amendment to prevent it." See note 58 below.

58. "Defendants under our criminal statutes are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried. * * * Our directions that indict-

A fortiori a litigant cannot complain because there is no class representation on the jury list or jury in proportion to population. He is not entitled to a list made up of all classes, or specified classes, or any class in any given proportion.[59]

Akins v. Texas, supra;[60]

Virginia v. Rives, note 25 above;

Thomas v. Texas, 212 U.S. 278, 282, 53 L.ed. 512, 514 (1909);[61]

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ments be quashed when negroes, although numerous in the community, were excluded from grand jury lists have been based on the theory that their continual exclusion indicated discrimination and **not the theory that racial groups must be recognized.** *Norris v. Alabama*, 294 U.S. 587, 79 L.ed. 1074; *Hill v. Texas*, 316 U.S. 400, 86 L.ed. 1559, and *Smith v. Texas*, 311 U.S. 128, 85 L.ed. 84, all supra. The mere fact of inequality in the number selected does not in itself show discrimination. A purpose to discriminate must be present * * *."

59. State cases to the same effect: *Jackson v. State*, 180 Md. 658, 26 A.2d 815, 816 (1942); *State v. Pierre*, 198 La. 619, 3 So. 2d 895 (1941), cert. den. 314 U.S. 676, 86 L.ed. 541; *Miera v. Territory*, 13 N.M. 192, 81 P. 586 (1905); ~~*J. H. Williams Co. v. Am. Tie etc. Co.*~~, 139 Ga. 74, 76 S.E. 676 (1912). Dame

60. See note 58. The Court also said: "Fairness in selection has never been held to require proportional representation of races upon a jury. *Virginia v. Rives*, 100 U.S. 313, 322, 323, 25 L.ed. 667, 670, 671; *Thomas v. Texas*, 212 U.S. 278, 282, 53 L.ed. 512, 513. Purposeful discrimination is not sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals. The number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection."

The number of possible classes which might be, or be claimed to be, a class or classes of which a litigant imagines himself a member equally "stands in the way of evolution" of a concept that every such class is a candidate for discrimination. Compare note 63, below.

61. The Court said, by quotation: "It may be that the jury commissioner did not give the negro race a full *pro rata* with the white race in the selection of the grand and petit juries in this case; still this would not be evidence of discrimination. If they fairly and honestly endeavored to discharge their duty, and did

Wong Yim v. United States, 118 F.2d 667 (C.C.A. 9,—1941, cert. den. 313 U.S. 589, 85 L.ed. 1544);

Beckett v. United States, 84 F.2d 731 (C.C.A. 6, 1936).[63]

Indeed, absence of any given class from the jury list or jury is without significance. It has no tendency to show improper conduct. It does not show the "purpose to discriminate" that must be present. (*Akins v. Texas*, p. 27 above.) It will not support an inference that the essential elements of valid complaint are present, i.e., systematic, purposeful, and arbitrary discrimination against members of a class solely because of membership in that class.

Virginia v. Rives, note 25 above;

Bush v. Kentucky, note 30 above;[64]

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not in fact discriminate against the negro race in the selection of the jury lists, then the Constitution of the United States has not been violated."

62. The rule is violated if "there is a systematic or arbitrary exclusion * * * of a particular race." But "the mere fact that the juries drawn from the lists represented only certain races, does not show that the list was made to include only two or three races or that it was in any manner discriminatory."

63. "The appellants wholly failed to produce any substantial evidence to establish a practice of systematic and arbitrary exclusion of negro citizens from the jury service. The proofs affirmatively show that a substantial number of colored citizens of the district were on the jury list. The fact that none were drawn for trial is, of course, not controlling. * * * We know of no statutory or constitutional mandate which requires proportional representation on jury lists of racial, religious, political or occupational groups within the district. Such requirement is not imperative to the drawing of a fair and impartial jury, would make impossible the functioning of the court and nullify the constitutional imperative that commands a speedy trial." Compare note 60 above.

64. After the matter first quoted in note 30 and ending "because of their race or color," the court went on: "It might have been true that only white citizens were selected and summoned; yet it would not necessarily follow that the officers had violated the law and the special instructions given by the court 'to pro-

Wood v. Brush, 140 U.S. 278, 35 Led. 505 (1891);

Jugiro v. Brush, 140 U.S. 291, 35 Led. 510 (1891);

Gibson v. Mississippi, p. 24 above;

Thomas v. Texas, note 61 above;[65]

Martin v. Texas, note 36 above;

Franklin v. South Carolina, 218 U.S. 161, 167, 54 Led. 980, 984 (1910);

Ruthenberg v. United States, 245 U.S. 480, 62 Led. 414 (1918);

Akins v. Texas, *notes* 58 and 60 above.

See *Snowden v. Hughes*, 321 U.S. 1, 9, 88 Led. 497, 503 (1944).[66]

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ceed in the selection without regard to race, color or previous condition of servitude.'"

65. "It was ruled in *Martin v. Texas*, 200 U.S. 316, 50 Led. 497, as in other cases, that discrimination in organizing a grand jury and impanelling a petit jury cannot be established by merely proving that no one of the defendant's race was on either of the juries. . . ."

66. "But a discriminatory purpose is not presumed, *Tarrance v. Florida*, 188 U.S. 519, 520, 47 Led. 572, 573, 23 S.Ct. 402, there must be a showing of 'clear and intentional discrimination.' *Gundling v. Chicago*, 177 U.S. 183, 186, 44 Led. 725, 728, 20 S.Ct. 633; see *Ah Sin v. Wittman*, 198 U.S. 500, 507, 508, 49 Led. 1142, 1145, 1146, 25 S.Ct. 756; *Bailey v. Alabama*, 219 U.S. 219, 231, 55 Led. 191, 197, 31 S.Ct. 145. Thus the denial of equal protection by the exclusion of negroes from a jury may be shown by extrinsic evidence of a purposeful discriminatory administration of a statute fair on its face, *Neal v. Delaware*, 103 U.S. 370, 394, 397, 26 Led. 567, 573, 574; *Norris v. Alabama*, 294 U.S. 587, 589, 79 Led. 1074, 1076, 55 S.Ct. 579; *Pierre v. Louisiana*, 306 U.S. 354, 357, 83 Led. 757, 759, 59 S.Ct. 536; *Smith v. Texas*, 311 U.S. 128, 130, 131, 85 Led. 84, 86, 87, 61 S.Ct. 164; *Hill v. Texas*, 316 U.S. 400, 404; 86 Led. 1559, 1562, 62 S.Ct. 1159. But, a mere showing that negroes were not included in a particular jury is not enough; there must be a showing of actual discrimination because of race. *Virginia v. Rives*, 100 U.S. 313, 322, 323, 25 Led. 667, 670, 671; *Martin v. Texas*, 200 U.S. 316, 320, 321, 50 Led. 497-499, 26 S.Ct. 338; *Thomas v. Texas*, 212 U.S. 278, 282, 53 Led. 512, 514, 29 S.Ct. 393; cf. *Williams v. Mississippi*, 170 U.S. 213, 225, 42 Led. 1012, 1016, 18 S.Ct. 583."

Lower Federal court and state cases are to the same effect.[67]

If members of the class to which the challenging party claims to belong, and which it is claimed was improperly excluded, actually appear on the jury list or jury, this answers the claim of systematic, purposeful and discriminatory exclusion.

Akins v. Texas, p. 27 above;
Murray v. Louisiana, 163 U.S. 101, 41 L.ed. 87 (1896);
Thomas v. Texas, 212 U.S. 278, 53 L.ed. 512 (1918);
Beckett v. United States, note 63 above;
People v. Prior, p. 30 above;
Miera v. Territory, 13 N.M. 192, 81 P. 586 (1905).

3. Preparation of the Jury List Is Committed to the Discretion of the Clerk and Jury Commissioner.

Jury lists do not produce themselves. Someone must prepare them. Under the Federal statutes, this is a non-delegable duty of the clerk (or his deputy) and the jury commissioner (Jud. Cod. §278, 28 U.S.C.A. §412 and see App. A, pp. I, 2, note 4). They must have some freedom of action. In the interest of efficient dispatch of the Court's business, they should not include on the list persons who are disqualified, exempt, or certain to be excused. (Cf. *Rawlins v. Georgia*, 201 U.S. 638, 640, 50

67. *Wong Yim v. United States*, note 62 above; *Beckett v. United States*, note 63 above; *Young v. United States*, 242 F. 788 (C.C.A. 4,—1917—cert. den. 245 U.S. 656, 62 L.ed. 533; *State v. Brownfield*, 60 S.C. 509, 39 S.E. 2 (1901), aff'd *Brownfield v. South Carolina*, 189 U.S. 426, 47 L.ed. 822 (1903); *State v. Ryan*, 141 Kan. 549, 42 P.2d 591, 592, col. 1 (1935); *Meeweather v. Commonwealth*, 118 Ky. 870, 82 S.W. 592 (1904); *State v. Logan*, 344 Mo. 351, 126 S.W.2d 256 (1939).

L.ed. 899, 900 (1906),[68] *Beckett v. United States*, note 63 above; *United States v. Brady*, 47 F. Supp. 362 (1942) aff'd 133 F.2d 476 (C.C.A. 4, 1943—cert. den. 319 U.S. 746, 87 L.ed. 1702 reh. den. 319 U.S. 784, 87 L.ed. 1727. See Cal. C.C.P. §198, *et seq.*) They must select "citizens" of proper age, possessed of "natural faculties and of ordinary intelligence and not decrepit," who have a "sufficient knowledge of the English language." (Cal. C.C.P. §198). They must avoid persons "convicted of malfeasance in office or any felony or other high crime" (Cal. C.C.P. 199), take only those "of fair character, and approved integrity, and of sound judgment" (Cal. C.C.P. §205), and should avoid persons having any of the numerous California exemptions (Cal. C.C.P. §200). A wise discretion would dictate avoidance of persons certain to be excused for personal reasons (*Rawlins v. Georgia*, supra).[69]

The duty of the clerk and commissioner calls for the exercise of judgment. To perform their duty they necessarily have committed to them a discretion in making selection of names from which to draw. In *Glasser v. United States*, 315 U.S. 60, 85, 86 L.ed. 680, 707 (1942), this Court said:

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68. "It appeared that the business of the persons omitted was such that either they would have been entitled to claim exemption, or that probably they would have been excused. • • • It could not be denied that the state properly could have excluded these classes had it seen fit, and that undeniable proposition ends the case." See note 57 above.

69. Compare Judge Knox's address to the Denver Bar Association, Oct. 16, 1944, 21 *Dicta* 283, and his testimony before the Committee of the Judiciary of the House of Representatives.—79th Congress, 1st Session.—hearing on H.R. 3379, 3380, 3381, June 12 and 13, 1945—Serial No. 3.

"Jurors in a federal court are to have the qualifications of those in the highest court in the state, and they are to be selected by the clerk of the court and a jury commissioner. Judicial Code §§275, 276, 28 U.S.C.A. §§411, 412. This duty of selection may not be delegated.[70] And, its exercise must always accord with the fact that the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community', and not the organ of any special group or class. If that requirement is observed the officials charged with choosing Federal jurors may exercise some discretion to the end that competent jurors may be called."

Williams v. Mississippi, 170 U.S. 213, 42 L.ed. 1012 (1898);[71]

Franklin v. South Carolina, 218 U.S. 161, 168, 54 L.ed. 980, 985 (1910);[72]

Akins v. Texas, supra;[73]

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70. Acc. *Dunn v. United States*, 238 F. 506, (C.C.A. 5, 1917), holding that before the 1917 Amendment, the clerk's deputy could not act for the clerk.

71. The claim was made that it was improper to commit any discretion to the officers getting up the jury list. The Court held against this and said that the statutes do not "on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them." See other language quoted, note 77, below.

72. The statute gave "to the jury commissioners the right to select electors of good moral character, such as they may deem qualified to serve as jurors, being persons of sound judgment and free from all legal exceptions. * * * The statute simply provides for an exercise of judgment in attempting to secure competent jurors of proper qualifications."

73. Names for the jury list were selected by the commissioners. "This method of selection leaves a wide range of discretion to the commissioners. Its validity, however, has been accepted by this court."

Walker v. United States, 93 F.2d 383, 391 (C.C.A. 8, 1937—cert. den. 303 U.S. 644, 82 L.ed. 1103, reh. den. 303 U.S. 668, 82 L.ed. 1124);[74]

Wilson v. United States, 104 F.2d 81 (C.C.A. 5, 1939—cert. den. 308 U.S. 574, 84 L.ed. 481);[75]

Collins v. State, 234 Ala. 197, 174 So. 296 (1937).

If the clerk and the jury commissioner properly exercise their discretion, within the rules noticed, their function is discharged. All that is called for is an honest and unbiased effort to obtain a jury list from which no class has been purposefully and systematically excluded because of class prejudice. If their conduct would not subject them to a fine of $5000.00 under §4 of the Act of March, 1875 (8 U.S.C.A. §44, App. A, p. 4), were the

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74. The clerk and commissioner, seeking information, sent out a circular letter saying that the desire was "to obtain for jury service the best men in the community, men of intelligence, unquestioned integrity, and who represent the best interests of the community. We do not want men for this service simply because they have nothing else to do * * *. We want men of business affairs." There was a claim of improper exclusion of "the wage-earning class and unemployed persons and all persons not 'men of business affairs.'" The Court held the challenge was properly overruled and said: "We think the contention is entirely without merit. This court has held that the exclusion of a certain part of a district is proper and that the court need not give any reason, and certainly there is a presumption that it has exercised a sound discretion in making the order and the burden is on the party who seeks to challenge it as arbitrary." It was further held that the clerk and the commissioner had not delegated their function; that "the law does not contemplate that they must acquire personal knowledge of or acquaintance with prospective jurors so that they may act on their personal knowledge. The manner of acquiring information is for them to determine * * * These officers, having discharged their duty in a manner not tainted by any suggestion of evil purpose or fraud, are not subject to criticism."

75. A claim of misconduct on the part of the clerk and commissioner in sending a questionnaire to prospective jurors was overruled.

claimed exclusion for race or color, it would not sustain a challenge to the array. A later verdict against a challenger does not demonstrate denial of the right to a fair and impartial jury.

Virginia v. Rives, note 25 above;
Martin v. Texas, note 36 above;
Thomas v. Texas, notes 36 and 61 above;
Akins v. Texas, Oct. Term, 1944, No. 853, ... U.S. ..., 89 L.ed. (Adv. Op.) 1206, 65 Sup. Ct. Rep. 1279 (1945);
Walker v. United States, note 74 above.
Cf. *Bush v. Kentucky*, note 30 above;
Collins v. State, 234 Ala. 197, 174 So. 296 (1937).

They have no duty to take affirmative steps for the inclusion of any person or class.[76] (See p. 32 above.) They need act only so that there is no discriminatory exclusion, —so that where the claimed exclusion is of a class determined by race or color they do not violate, and subject themselves to the penalties of §4 of the Civil Rights Act of March 1, 1875 (8 U.S.C.A. §44). (Cf. *Ex parte Virginia*, p. 22 above. See *Virginia v. Rives*, 100 U.S. 313, 25 L.ed. 667, 670 (1880).) Whether they so acted is the question in this case.

4. Whether the Clerk and Jury Commissioner Properly Exercised Their Discretion Is a Question of Fact for the Trial Court.

Where the clerk and the jury commissioner acted under statutes which do not themselves improperly exclude any

76. If the method is such that there is a fair chance that members of a class may appear on the list nothing more is required. (*State v. Logan*, 244 Mo. 351, 126 S.W.2d 256 (1939).)

eligible class, the question whether they properly exercised their discretion, how they acted and whether they acted honestly, necessarily presents "a question of fact." (*Thomas v. Texas*, 212 U.S. 278, 282, 53 L.ed. 512, 514 (1909) and cases below at p. 44)

The issue is raised by a challenge to the array. It may take the form of a challenge in terms or of a motion to quash. It must be sufficiently precise to present an issue that can be tried and must, on its face, state facts which, if proved, would show an abuse of discretion.

Virginia v. Rives, note 25 above;

Bush v. Kentucky, note 30 above;

Williams v. Mississippi, 170 U.S. 213, 223, 42 L.ed. 1012, 1016;[77]

Franklin v. South Carolina, 218 U.S. 161, 167, 54 L.ed. 980, 984;[78]

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77. The charge was that the Mississippi statutes, by granting discretion to the officers who selected the jury list, denied equal protection and benefits of the laws of Mississippi to citizens because of race and color, resulting from the exercise of the discretion partial to the white citizens. The Court said: "It will be observed that there is nothing direct and definite in this allegation either as to means or time as affecting the proceedings against the accused. There is no charge against the officers to whom is submitted the selection of grand and petit jurors, or of those who procured the lists of the jurors. There is an allegation of the purpose of the convention to disfranchise citizens of the colored race, but with this we have no concern, unless the purpose is executed by the Constitution or laws or by those who administer them. If it is done in the latter way, how and by what means should be shown."

78. "There was no allegation in the motion to quash upon this ground, or offer of proof to show that persons of the African race were excluded because of their race or color from serving as grand jurors in the criminal prosecution of persons of that race; therefore the case does not come within the rule laid down in *Carter v. Texas*, 177 U.S. 442, 44 L.ed. 839; *Rogers v. Alabama*, 192 U.S. 226, 48 L.ed. 417, and kindred cases * * *. In this

Cf. *Agnew v. United States*, 165 U.S. 36, 44, 41 Led. 624, 627 (1897);

Hyde v. United States, 225 U.S. 347, 373, 56 Led. 1114, 1128 (1912).

This issue of fact is to be determined by the court of original jurisdiction,—the court for which the jury list is prepared. "All challenges, whether to the array or panel or to individual jurors for cause or favor, shall be tried by the court without the aid of triers." (Jud. Cod. §287, 28 U.S.C.A. §424, App. A, p. 7) The trial court is competent to determine the fact.

Wood v. Brush, 140 U.S. 278, 285, 35 Led. 505, 508 (1891),[79] followed in

Jugiro v. Brush, 140 U.S. 291, 35 Led. 510;

Andrews v. Swartz, 156 U.S. 272, 39 Led. 422 (1895);

Gibson v. Mississippi, 162 U.S. 565, 584, 40 Led. 1075, 1079 (1896);[80]

Pierre v. Louisiana, 306 U.S. 354, 83 Led. 757 (1939);[81]

Akins v. Texas, p. 46 below.

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class of cases, when the real objection is that the grand jury is so made up as to exclude persons of the race of the accused from serving in that capacity, it is essential to aver and prove such facts as establish the contention. *Martin v. Texas*, 200 U.S. 316, 50 Led. 497."

79. Whether the grand and petit jurors were properly selected "was a question which the trial court was entirely competent to decide."

80. Referring to matter upon which the challenger claimed to rely, the Court said that if it were competent to prove the matter "it is clear that such evidence would be for the consideration of the trial court on a motion by the accused to quash the indictment."

81. The trial court had quashed the petit jury because of discriminatory exclusion of negroes. The grand jury had been drawn

The determination by the trial court of the issues raised by the challenge to the array is entitled to the same respect as the determination of any other question of fact committed to it. If it finds the fact (a general finding by denial of the challenge is sufficient, *Akins v. Texas*, infra), and that there has been no abuse of discretion by the clerk and the jury commissioner, its finding must be affirmed, if there is any evidence to support it. This Court said in *Thomas v. Texas*, 212 U.S. 278, 281, 282, 53 L.ed. 512, 513, 514 (1909):

> "The only contention was that the Jury Commissioners, in the selection of the grand and petit juries who returned the indictment and tried plaintiff in error, did in fact exclude therefrom negroes or persons of African descent because of their race and color. This was a question of fact; and the ordinary rule is that questions of fact will not be reviewed by this court on writs of error to state courts. * * * As before remarked whether such discrimination was practiced in this case, was a question of fact and the determination of this question adversely to plaintiff in error by the trial court and by the court of criminal appeals was decisive, so far as this court is concerned, unless it could be held that these decisions constitute such abuse as amounted to an infraction of the Federal Constitution which cannot be presumed, and which there is no reason to hold on the record before us."

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from the same box. This Court rested heavily on the finding of the trial court in respect of the list from which the petit jury was drawn and said that if the evidence "was sufficient to support the trial court's action in quashing the Petit Jury drawn from that general venire it necessarily follows that the indictment returned by a Grand Jury selected from the same general venire, should also have been quashed."

This Court stated the rule again in *Akins v. Texas*, Oct. Term, 1944, No. 853, ... U.S. ..., 89 L.ed. (Adv. Op.), 1206, 1209, 65 Sup. Ct. Rep. 1279 (1945) as follows:

> "As will presently appear, the transcript of the evidence presents certain inconsistencies and conflicts of testimony in regard to limiting the number of negroes on the grand jury. Therefore, the trier of fact who heard the witnesses in full and observed their demeanor on the stand has a better opportunity than a reviewing court to reach a correct conclusion as to the existence of that type of discrimination. While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a Federal constitutional right has been denied, expressly or in substance and effect, *Norris v. Alabama*, 294 U.S. 587, 589, 590, 79 L.ed. 1074, 1076, 1077, 55 S.Ct. 579; *Smith v. Texas*, 311 U.S. 128, 130, 85 L.ed. 84, 86, 61 S.Ct. 164, we accord in that examination great respect to the conclusions of the state judiciary. *Pierre v. Louisiana*, 306 U.S. 354, 358, 83 L.ed. 757, 760, 59 S.Ct. 536. That respect leads us to accept the conclusion of the trier on disputed issues 'unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process', (citing cases)".

Accord:[82]

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82. The rule in the state courts is the same. *Herndon v. State*, 178 Ga. 832, 174 S.E. 597, 601 (1934), app. dis. 295 U.S. 441, 79 L.ed. 1530 (1935); *State v. Walls*, 211 N.C. 487, 191 S.E. 232, 237 (1937), app. dis. and cert. den. 302 U.S. 635, 826 L.ed. 494 (1937); *State v. Henderson*, 216 N.C. 99, 3 S.E.2d 357, 361

Cases at p. 44 above;

United States v. Johnson, Oct. Term, 1945, Nos. 115 and 116, ... U.S. ..., 90 L.ed. (Adv. Op.) 389, 66 Sup. Ct. Rep. 464;

Green v. United States, 19 F.2d 850 (C.C.A. 9, 1927—aff'd on certiorari limited to question of wire tapping, 277 U.S. 438, 72 L.ed. 944 (1928);[83]

Robinson v. United States, 144 F.2d 392, 398 (C.C.A. 6, 1944—aff'd on certiorari limited to another question, 324 U.S. 282, 89 L.ed. (Adv. Op.) 635 (1945).[83]

Cf. *Reynolds v. United States*, 98 U.S. 145, 156, 25 L.ed. 244, 247 (1879) followed in

Ex parte Spies, 123 U.S. 131, 179, 31 L.ed. 80, 90 (1887);

American Tobacco Co. v. United States, 147 F.2d 93, 118 (C.C.A. 6, 1944—cert. gr. ltd. to another question, 324 U.S. 836, 89 L.ed. (Adv. Op.) 802).

The point has been reached where the main issue here can be stated: Is there evidence to sustain the finding of the trial court that there was no discriminatory exclusion,—systematically, purposefully and arbitrarily,—of any class of qualified and non-exempt persons, solely because of membership in that class, to the prejudice of petitioner on the trial of this case? Is there evidence to support the trial court's finding that there was no abuse

(1939); *Lugo v. State*, 136 Tex. Crim. App. 226, 124 S.W.2d 344 (1938); *Hamilton v. State*, 138 Tex. Crim. App. 205, 135 S.W.2d 476 (1940), second appeal 141 Tex. Crim. App. 614, 150 S.W.2d 395 (1941), cert. den. 314 U.S. 609, 86 L.ed. 490.

83. The *Green* and *Robinson Cases* state the rule by saying that the determination of the trial court can not be disturbed unless an abuse of discretion is shown. See, also, *Lugo v. State*, note 82 above; *Hamilton v. State*, note 82 above.

of the discretion committed to the clerk and the jury commissioner?

5. The Burden of Proof and the Burden of Showing Error Is Petitioner's.

Here the petitioner has the burden of showing error in want of any evidentiary support for the determination of the trial court. In the trial court, petitioner had the burden of proof of his claim by competent evidence. There are no presumptions to assist him. To the contrary the presumptions are the other way. In *Akins v. Texas*, supra, this Court said:

> "The burden is, of course, upon the defendant to establish the discrimination. *Tarrance v. Florida*, 188 U.S. 519, 520, 47 L.ed. 572, 573, 23 S.Ct. 402; *Martin v. Texas*, 200 U.S. 316, 50 L.ed. 497, 26 S.Ct. 338; *Norris v. Alabama*, 294 U.S. 587, 590, 79 L.ed. 1074, 1077, 55 S.Ct. 579. An allegation of discriminatory practices in selecting a grand jury panel challenges an essential element of proper judicial procedure: the requirement of fairness on the part of the judicial arm of government in dealing with persons charged with criminal offenses. It cannot be lightly concluded that officers of the courts disregard this accepted standard of justice."

In *Glasser v. United States*, 315 U.S. 60, 87, 86 L.ed. 680, 708 reh. den. 315, U.S. 827, 86 L.ed. 1222 (1942), this Court said, referring to a stipulation that an affidavit might be accepted as proof:

> "In the absence of such a stipulation, it is incumbent on the moving party to introduce, or to offer, distinct evidence in support of the motion: the formal affidavit alone, even though uncontroverted, is not enough. *Smith v. Mississippi*, 162 U.S. 592,

40 L.ed. 1082; *Tarrance v. Florida*, 188 U.S. 519, 47 L.ed. 572; cf. *Brownfield v. South Carolina*, 189 U.S. 426, 47 L.ed. 882.[84] * * * The failure of petitioners to prove their contention is fatal."

In *Lewis v. United States*, 279 U.S. 63, 73 L.ed. 615, 619 (1929), this Court said that if "the contrary is not expressly shown", compliance with the Federal statutes dealing with preparation of jury lists

> "may be taken as sufficiently established by the presumption of regularity. It is the settled rule that all necessary prerequisites to the validity of official action are presumed to be complied with and that where the contrary is asserted it must be affirmatively shown."

Accord:[85]

Neal v. Delaware, 103 U.S. 370, 26 L.ed. 267 (1881);

Bush v. Kentucky, 107 U.S. 101, 27 L.ed. 354 (1883);

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84. The Court held in this case that a motion is not a pleading, does not require an answer and is not taken as true if not controverted.

85. The holdings of the lower Federal Courts and State Courts are to the same effect. *Mamaux v. United States*, 264 F. 816, 819 (C.C.A. 6,—1920); *Wolf v. United States*, 292 F. 673, 678 (C.C.A. 6,—1923); *Hindman v. United States*, 292 F. 679, 682 (C.C.A. 6,—1923); *Carroll v. United States*, 16 F.2d 951, 955 (C.C.A. 2,—1927, cert. den. 273 U.S. 763, 71 L.ed. 880); *Needham v. United States*, 73 F.2d 1, 2 (C.C.A. 7,—1934, cert. den. 294 U.S. 705, 79 L.ed. 1241); *Walker v. United States*, note 74 above; *United States v. Brady*, 47 F.Supp. 362, 368 (1942), aff'd 133 F.2d 476, 480 (C.C.A. 4,—1943—cert. den. 319 U.S. 746, 87 L.ed. 1702, reh. den. 319 U.S. 784, 87 L.ed. 1727); *State v. Brownfield*, 60 S.C. 509, 39 S.E. 2 (1901), aff'd 189 U.S. 426, 47 L.ed. 882 (1903); *Haynes v. State*, 71 Fla. 585, 72 So. 180, 182 (1916); *State v. Dallao*, 187 La. 392, 175 So. 4 (1937), app. dis. and cert. den. 302 U.S. 635 and 636, 82 L.ed. 494 and 495, reh. den. 302 U.S. 776 and 777, 82 L.ed. 601; *State v. Pierre*, 198 La. 619, 3 So.2d 895 (1941), cert. den. 314 U.S. 676, 86 L.ed. 541; *J. P. Williams Co. v. American etc. Co.*, 139 Ga. 74, 76 S.E. 675 (1912).

Tarrance v. Florida, 188 U.S. 519, 520, 47 L.ed. 572, 573 (1903);

Brownfield v. South Carolina, 189 U.S. 426, 47 L.ed. 882 (1903);

Martin v. Texas, 200 U.S. 316, 50 L.ed. 497 (1906);

Thomas v. Texas, page 45 above;

Franklin v. South Carolina, note 78 above;

Snowden v. Hughes, note 66 above.

The presumption was not met, much less overcome. The burden was not sustained. The evidence amply supports the determination of the trial court. Indeed, the trial judge could have made no other determination.

6. To Carry His Burden, Petitioner Must Affirmatively Show That He Was Prejudiced by Any Claimed Error.

It is not enough for a party complaining of a judgment to show that there was some irregularity in the proceedings. He must not only show error, but that he was prejudiced by that error. He must show that he was prejudiced in a substantial way. "On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the Court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." (Jud. Cod. §269, 28 U.S.C.A. §391) Prejudice must be shown.[86] It is not presumed. The presumption is the other way.[87]

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86. *Horning v. Dist. of Columbia*, 254 U.S. 135, 65 L.ed. 185 (1920); *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 66 L.ed. 927, 930 (1922); *Palmer v. Hoffman*, 318 U.S. 109, 116, 87 L.ed. 645, 651 (1943); *Shuman v. United States*, 16 F.2d 457

The rule just noticed applies as well to the operation of the machinery for getting jurymen into the box and from them selecting jurors, as to any other step leading to a final judgment."[87] When class discrimination is claimed the challenger must show a "discrimination which affects" him. (*Akins v. Texas*, supra. Cf. pp. 42-50 above.)

Wrongful exclusion of a class from the jury list is colorless unless, but for such exclusion, the result probably would have been different. If "the nature of the classes

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(C.C.A. 5,—1927); *Nash v. United States*, 54 F.2d 1006 (C.C.A. 2,—1932—cert. den. 285 U.S. 556, 76 L.ed. 945); *United States v. Parker*, 103 F.2d 857, 863 (C.C.A. 3,—1939—cert. den. 307 U.S. 642, 83 L.ed. 1522); *United States v. Monjar*, 147 F.2d 916, 924 (C.C.A. 3,—1945—cert. den. ..... U.S. ....., 89 L.ed. (Adv. Op.) 1158 and 1159).

87. *Berger v. United States*, 295 U.S. 78, 81, 82, 79 L.ed. 1314, 1318 (1935); *Palmer v. Hoffman*, note 86 above: "He who seeks to have a judgment set aside because of an erroneous ruling has the burden of showing that prejudice resulted."

88. *Agnew v. United States*, 165 U.S. 36, 44, 45, 41 L.ed. 624, 627 (1897); *Hyde v. United States*, 225 U.S. 347, 374, 56 L.ed. 1114, 1129 (1912); *Stroud v. United States*, 251 U.S. 15, 20, 64 L.ed. 103, 111 (1919); *Gaughan v. United States*, 19 F.2d 897, 899 (C.C.A. 8,—1927); *Tierney v. United States*, 280 F. 322 (C.C.A. 4,—1922—cert. den. 259 U.S. 588, 66 L.ed. 1077); *Vesely v. United States*, 276 F. 693 (C.C.A. 9,—1921—cert. den. 259 U.S. 588, 66 L.ed. 1077); *Wuichet v. United States*, 8 F.2d 561, 562 (C.C.A. 6,—1925—cert. den. 270 U.S. 651, 70 L.ed. 781); *Morrison v. United States*, 71 F.2d 358 (C.C.A. 5,—1934—cert. den. 293 U.S. 589, 79 L.ed. 684); *Brookman v. United States*, 8 F.2d 803, 806 (C.C.A 8,—1925); *Walker v. United States*, note 74 above; *Wilson v. United States*, 104 F.2d 81 (C.C.A. 5,—1939—cert. den. 308 U.S. 574, 84 L.ed. 481); *United States v. Meyer*, 113 F.2d 387, 396 (C.C.A. 7,—1940—cert. den. 311 U.S. 706, 85 L.ed. 459); *Rogers v. State*, 133 Ark. 85, 201 S.W. 845, 846 (1918); *People v. Walsh*, 322 Ill. 195, 153 N.E. 357 (1926); *State v. Dallao*, 187 La. 392, 175 So. 4 (1937—app. dis. and cert. den. 302 U.S. 635 and 636, 82 L.ed. 494 and 495, reh. den. 302 U.S. 776 and 777, 82 L.ed. 601); *Miera v. Territory*, 13 N.M. 192, 81 P. 586 (1905); *State v. Leatherwood*, 26 N.M. 506, 194 P. 600 (1920); *Blenden v. State*, 50 Okla. Cr. 313, 297 P. 827 (1931); *State v. Savan*, 148 Ore. 423, 36 P.2d 594 (1934).

excluded was not such as was likely to affect the conduct of the members as jurymen, or to make them act otherwise than those who were drawn would act" there is no ground of complaint (*Rawlins v. Georgia*, 201 U.S. 638, 640, 50 L.ed. 899, 900 (1906)).

If the assumed class, **in respect of the matter to be submitted to the jury,** is heterogeneous,—if there are no common class prejudices or class bias *quoad hoc*,—the classification is irrelevant to the performance of jury duty, however relevant it may be for other purposes. Herein lies the significance of the designation of certain classes by statute.[89]

The inquiry whether a litigant has been prejudiced in a particular case does not end with recognizing a class, designated by statute or found in fact, having a common viewpoint and bias for its members (or against which others may be prejudiced) such that its exclusion may affect some litigation. Assumed class bias and, by consequence, exclusion of the class from the jury list, cannot be presumed to affect a verdict, and prejudice

89. Dealing specifically with the subject of jury service, Congress has selected classes determined (1) by race or color (Jud. Cod. §278, 28 U.S.C.A. §415; 8 U.S.C.A. §44, App. A, pp. 4-6) and (2) by "party affiliations" (Jud. Cod. §276, 28 U.S.C.A. §412—App. A, p. 3) as classes against which there shall be no discrimination. There is here legislative determination of common class interests and prejudices. In view of the breadth of spirit of the First Amendment, it may be fair to say that there has been a similar legislative determination about religious groups. (Cf. *Marsh v. Alabama*, Oct. Term 1945, No. 114, ... U.S. ....., 90 L.ed. (Adv. Op.) ....., 66 Sup. Ct. Rep. 276 (1946); *West Virginia v. Barnett*, 319 U.S. 624, 634, 87 L.ed. 1628, 1635 (1943); Cal. Const., Art. I, §4, App. A, p. 12.) Beyond these groups, legalistic assumptions cannot be made. The challenger must produce facts or the court must legislate.

one of the parties, in a particular case if the parties or issues are not such as appeal to the assumed class bias.

If the challenger does not belong to the assumed excluded class there is no room to argue that the exclusion affected his case. He must first show that he belonged to the excluded class. In *Rawlins v. Georgia*, supra, this Court expressly pointed out:

> "It does not even appear that any of the defendants belong to any of the excluded classes."

Compare *Akins v. Texas*, p. 51 above (89 L.ed. (Adv. Op.) at 1210, col. 2).[90]

Equally, there is no discrimination which affects a litigant, if the issues made by the pleadings and actually tried are not such that assumed prepossessions of or against an excluded class would reflect themselves in the determination the jury makes. (Compare *United States v. Wood*, 299 U.S. 123, 149, 81 L.ed. 78, 90 (1936) reh. den. 299 U.S. 624, 81 L.ed. 459; *Ruthenberg v. United States*, 245 U.S. 480, 62 L.ed. 414 (1918); *Lang v. New Jersey*, 209 U.S. 467, 52 L.ed. 894 (1908); *Thiede v. Utah*, 159 U.S. 510, 40 L.ed. 237 (1895); *Agnew v. United States*;

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90. So a white man cannot complain of discrimination against, and exclusion of, negroes (*Commonwealth v. Wright*, 79 Ky. 22, 42 Am. Rep. 203 (1880); *State v. Dierlamm*, 189 La. 544, 180 So. 135 (1938)). Men are in no position to complain of the exclusion of women (*Wuichet v. United States*, 8 F.2d 803 (C.C.A. 8,—1925—cert. den. 270 U.S. 651, 70 L.ed. 781); *McKinney v. State*, 3 Wyo. 719, 30 Pac. 293 (1892); *State v. James*, 96 N.J.L. 132, 114 Atl. 553 (1921); *State v. Carlino*, 98 N.J.L. 48, 118 Atl. 784 (1922), aff'd 99 N.J.L. 292, 122 Atl. 830 (1923); *Commonwealth v. Duca*, 312 Pa. 101, 165 Atl. 825 (1933); *People v. Parman*, 14 C.2d 17, 92 P.2d 387 (1939)), and women cannot complain of the exclusion of men (*People v. Manuel*, 41 Cal. App. 153, 182 Pac. 306 (1919)).

165 U.S. 36, 41 L.ed. 624 (1897); *Ex parte Spies*, 123 U.S. 131, 31 L.ed 80 (1887).)[91]

We have said that here lies the significance of legislative designation of classes. Here too lies the danger of too vague and hasty generalization from the cases decided by this Court. Here it is significant that every decision of this Court was in a **criminal** case;[92] that all but four of the decisions of this Court were in cases of negro defendants and claimed exclusion of **negroes** from the jury (see note 21); that of those four cases, one (*Jugiro v. Brush*, note 21 above) presented a claim of exclusion which, had it been made out, would have come within the same act that applies to the exclusion of negroes,—forbidding disqualification "on account of race, color or previous condition of servitude" (section 4 of Act of March 1, 1875 [8 U.S.C.A. §44, App. A, p. 4]),—and another, (*Ruthenberg v. United States*, note 21 above) presented a claim of exclusion because of political affiliation which, if made out, violated Judicial Code §276 (28 U.S.C.A. §412, App. A, p. 1 at 3); that only two decisions of this Court (the *Rawlins Case* and *Glasser Case*, note 21 above) did not involve claims falling within one of the Federal statutes (the Act of 1875 [App. A, p. 4] or the Act of 1879 [App. A, p. 3, note 5]—see note 23 above); that the discussion in the *Glasser Case* is dictum, the

91. Compare *Miera v. Territory*, 13 N.M. 192, 31 Pac. 586, 587, col. 2 (1905); *In re Housing Authority*, 126 N.J.L. 60, 17 A.2d 812 (1941); *Rose v. Sheedy*, 245 Mo. 501, 134 S.W.2d 1018 (1939); *State v. Hathaway*, 224 Iowa 478, 276 N.W. 207 (1937).

92. This is true of the overwhelming majority (we do not say all, because we may have overlooked some) of the decisions of the lower Federal courts and state courts.

Court was not required to discuss the problem here presented and the dictum did not elect to do so; that in the *Rawlins Case*, the Court was required to consider the question, and held, where the excluded class was not one specified by a Federal statute, that a judgment would not be reversed in the absence of a showing that the exclusion affected the result.[93]

The point of the circumstance that all the decisions of this Court have been in criminal cases is that this Court has had no occasion to discuss whether the issues involved were such as to appeal to prejudices for or against the claimed excluded class (but compare *United States v. Wood*, supra). There is no case in which a greater appeal would be made to class prejudice than one in which a member of a minor group (minor in point of social influence if not of numbers), between which and those representing the dominant social forces mutual prejudices exist, is charged with an offense against society. No such assumption can be made in a civil case. The issues may or may not appeal to social or political prejudices. If we assume a reciprocal antipathy of employer for employee and worker for hirer, what possible bearing can it have in an action where the only significant relationship is that of carrier and passenger, where both employers and employees, for the purposes of that case, belong in the same class (customers of the carrier) and where all those who might be assumed to have the carrier's point of view are excluded, for every "superintendent, engineer, fireman,

93. The Court also indicated that it was proper to omit from the jury list persons whose business was such that "probably they would have been excused."

brakeman, motorman, or conductor on a railroad" (Cal. C.C.P. §§200-12) is excluded from jury service by statute?

This is the significance of the circumstance that all but four decisions of this Court have been in cases of claimed exclusion of negroes: Congress has designated negroes as a class which shall not be excluded. (Act of March 1, 1875, §4, 8 U.S.C.A. §44.) This must be taken as a legislative determination of social antipathies such that exclusions of this class are likely to be reflected in verdicts. This Court has said that the legislative determination accords with the known facts. (*Strauder v. West Virginia*, 100 U.S. 303, 25 L.ed. 664 (1880).) The history of the statute demonstrates its special orientation. (See App. A, note 7.) The decision in the *Civil Rights Cases*, 109 U.S. 3, 27 L.ed. 835 (1883), holding unconstitutional other substantive provisions of the statute of which it was a part has left it standing alone. But it should not be forgotten, on that account, that it was part of Sumner's Civil Rights Act. If the cases brought to this Court since 1880 show anything they confirm the Congressional determination of the social fact. But whatever prejudice results to a negro prosecuted on a criminal charge if members of his race as systematically discriminated against, and whatever irregularity there may be in excluding negroes when a white man is prosecuted on a criminal charge, a white criminal defendant is not prejudiced by the exclusion of negroes (see note 90 above). Nor does the logic of the negro criminal cases reach civil litigation in which both plaintiff and defendant are negroes or whites or in which no one on the jury list belongs to the class in which the challenger's opponent be-

longs. (And compare *Miera v. Territory*, 13 N.M. 192, 81 Pac. 586 (1905).)

Neither the *Jugiro Case* (claimed exclusion of Japs) nor the *Ruthenberg Case* (claimed exclusion of Socialists) reached the stage where it was necessary to consider the question of prejudice to the defendant, because in neither was there any showing of any irregularity in preparing the jury list. The *Glasser Case* is in the same class. However clear the Illinois statutes directing that women be put on juries, there was complete want of proof that they had not been properly included or that selection had been made from the membership of private organizations. The dictum concerned itself with only the most obvious possibilities of irregularity. It did not discuss the question of resulting prejudice to the defendants from any assumed irregularity.

Rawlins v. Georgia, 201 U.S. 638, 50 L.ed. 899 (1906), is left as the only decision of this Court which considered the matter in a case like this in which no aspect of the question had received Congressional determination.

7. In Endeavoring to Carry His Burden, Petitioner Can Rely Only on the Evidence Taken in Open Court.

Petitioner does not have the benefit of any presumption (p. 48 et seq. above), nor does he have the benefit of any admissions (see note 84 above). His only reliance can be on some proper affirmative showing. The only showing on which he can rely is the testimony *ore tenus*.

Petitioner has gone outside the record to call attention to claimed activities of a "civic club" and of the Board of Supervisors of San Francisco. Petitioner's attorney

inspired them.[94] Neither we nor the Court knew of these *ex parte* proceedings, or could have known of them.[95] They are no part of the record and are not before the Court.

Schley v. Pullman's Palace Car Co., 120 U.S. 575, 30 L.ed. 789, 790 (1887).[96]

Accord:

Thomson v. Gaskill, 315 U.S. 442, 446, 86 L.ed. 951, 955 (1942);

Clark v. Paul Gray, Inc., 306 U.S. 583, 589, 83 L.ed. 1001, 1008 (1939);

Metropolitan R. Co. v. McFarland, 195 U.S. 322, 329, 49 L.ed. 219, 223 (1904);

Agnew v. United States, 165 U.S. 36, 45, 41 L.ed. 624, 627, 628 (1897);

The New York etc. Co. v. Fraser, 130 U.S. 611, 620, 32 L.ed. 1031, 1034 (1889);

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94. In note 5, p. 3 of our Answer to the Petition for Certiorari, we said of these matters which are not only wholly outside the record, but are equally outside the case itself, that petitioner's attorney "was a past president of this 'civic club' and that he instigated and took the lead in the proceedings referred to." This footnote 5 is noticed in petitioner's Reply Brief on Certiorari (f 5). There is no denial of the statement just quoted.

95. Their first appearance, at any stage in this case, was in the Petition for Certiorari. For reasons not disclosed, but obviously not those which should have governed his conduct, petitioner's attorney did not suggest these matters to the Circuit Court of Appeals.

96. If counsel does not appreciate the impropriety of reference to such matter this case will point it out for him at some length. The following might be consulted, too: *Waldron v. Waldron*, 156 U.S. 361, 379, 39 L.ed. 453, 458 (1895); *Berger v. United States*, 295 U.S. 78, 85, 79 L.ed. 1314, 1320 (1935); *Hall v. United States*, 150 U.S. 76, 37 L.ed. 1003 (1893).

Congress etc. Spring Co. v. Knowlton, 103 U.S. 49, 61, 26 L.ed. 347, 351 (1881);

Kerr v. Clampitt, 95 U.S. 188, 24 L.ed. 493 (1877);

United States v. Hosmer, 9 Wall. 432, 19 L.ed. 662 (1870).

Moreover, they **never** could have been part of the record. It is not only that they would not have been admissible. They could not even have been offered. They came long after the action of the trial court which is here complained of. They were not before the Court, could not have been before the Court, and cannot furnish any basis for arguing that the Court did not rule properly on the showing made to it. (Compare *United States v. Brady*, 47 F. Supp. 362 (1942) aff'd 133 F.2d 476 (C.C.A. 4.—1943—cert. den. 319 U.S. 746, 87 L.ed. 1702, reh. den. 319 U.S. 784, 87 L.ed. 1727); *Wood v. Brush*, 140 U.S. 278, 35 L.ed. 505 (1891) and cases noticed below under this subhead.)

The petition and supporting briefs contain other statements without basis except an **affidavit of petitioner's attorney** filed with petitioner's notice of motion to strike out the jury panel, but never offered in evidence.[97] When the motion came on to be heard, appropriate objection[98]

97. Such statements will be found in the petition at f 2, f 3, f 4. This applies to all statements for which the only record reference in the petition or supporting briefs is "R 63-68." Such references are, of course, to the typewritten record.

98. Where proof can be made by affidavit (it cannot be so made on a motion of this sort—see below), the affidavit must meet the same tests of admissibility as evidence *ore tenus*. (*Willis v. Lauridson*, 161 Cal. 106, 108, 118 Pac. 530 (1911); *Bull v. International Power Co.*, 87 N.J.Eq. 1, 99 A. 111, 114 (1916).) Mere conclusions and generalities, without statement of

to the affidavit was made (R 15, 16).[99] The objection was not ruled on because the affidavit was never offered in evidence (R 15-68) and, by consequence, was not before the Court and is not now before this Court.[100] Had it been offered the objection must have been sustained. On a motion of this sort affidavits are wholly insufficient to support the claim of discrimination. The challenger must "offer distinct evidence in support of the motion; the formal affidavit, alone, even though uncontroverted, is not enough." (*Glasser v. United States*, p. 48 above.) Such an affidavit can be used to show the facts only where

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evidentiary fact, are insufficient for any purpose. (*Willis v. Lauridson*, supra; *Bull v. International Power Co.*, supra; *Mason v. San-Val etc. Co.*, 1 C.2d 666, 672, 36 P.2d 620 (1934); *A. G. Col. Co. v. Superior Court*, 196 Cal. 604, 615, 238 Pac. 926 (1925); *Schwartz v. Arata*, 45 C.A. 596, 606, 188 Pac. 312 (1920).) Hearsay statements are without probative effect when met with objection on that ground. (*Bull v. International Power Co.*, supra; *A. G. Col. Co. v. Superior Court*, supra; *Pandolfo v. United States*, 286 Fed. 8, 20 (C.C.A. 7,—1922—cert. den. 261 U.S. 621, 67 L.ed. 831); *In re Roth*, 3 C.A.2d 226, 233, 235, 39 P.2d 490 (1934); *Union etc. Bank v. Kolpenitsky*, 125 N.J.Eq. 125, 4 A.2d 413, 415 (1939).)

99. There was objection to the introduction of any evidence because the grounds stated in the notice of motion were insufficient as matter of law, since they did not show a claim of purposeful, systematic, or arbitrary exclusion of any member of a class to which petitioner belonged. There was objection to consideration of the affidavit upon the ground that the matter in the first paragraph was incompetent, irrelevant, and immaterial; that it was apparent that the rest was hearsay; that the references to what had happened in other cases was immaterial, irrelevant and incompetent and an attempt to raise collateral issues.

100. See 1 *Wigmore*, Evidence, 3d Ed. §17; *Oxford Paper Co. v. United States*, 56 F.2d 895 (Ct. Cl.,—1932); *O'Connell v. O'Connell*, 203 Cal. 541, 543, 264 Pac. 1095 (1928); *Melde v. Reynolds*, 120 Cal. 234, 52 Pac. 491 (1898); *Foster v. The Liverpool etc. Co.*, 222 Ill. App. 37, 40 (1921).

there is an express or implied stipulation that it can be so used.

Smith v. Mississippi, 162 U.S. 592, 600, 40 L.ed. 1082, 1085 (1896);[101]

Carter v. Texas, 177 U.S. 442, 447, 44 L.ed. 839, 891 (1900);

Tarrance v. Florida, 188 U.S. 519, 47 L.ed. 572 (1903);[102]

Brownfield v. South Carolina, 189 U.S. 426, 47 L.ed. 882 (1903);

Martin v. Texas, 200 U.S. 316, 50 L.ed. 497 (1906);[103]

Franklin v. South Carolina, 218 U.S. 161, 167, 54 L.ed. 980, 985 (1910).[104]

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101. *Neal v. Delaware*, 103 U.S. 370, 394, 395, 26 L.ed. 567, 573 (1881), was distinguished because in that case there was an implied stipulation that the affidavit might be used. The *Smith Case* itself held that in the absence of such a stipulation the affidavit could not serve as evidence; that it could only be used with consent and by order of court; that by consequence the motion was not supported and it could not be held that it was erroneously denied; that it "should have been sustained by the evidence introduced or offered to be introduced by the accused."

102. *Smith v. Mississippi*, supra, was followed and the Court said that "an actual discrimination is not presumed. It must be proved or admitted."

103. The moving party did not introduce evidence "but was content to rely simply on his verified written motion." *Held*, that it was not error to overrule the motions, for "it does not appear that the facts stated in those motions were established by evidence", or that there was any offer of proof.

104. Lower Federal and state court cases are to the same effect. *Mamaux v. United States*, 264 Fed. 816, 819 (C.C.A. 6,—1920); *United States v. Brady*, 47 F.Supp. 362 (1942), aff'd 133 F.2d 476 (C.C.A. 4,—1943—cert. den. 319 U.S. 746, 87 L.ed. 1702, reh. den. 319 U.S. 784, 87 L.ed. 1727); *Franklin v. State*, 85 Ark. 534, 109 S.W. 298 (1908); *Montjoy v. Commonwealth*, 262 Ky. 426, 90 S.W.2d 362 (1935).

In the *Mamaux Case* it was claimed that "wage earners" were excluded as a class. No evidence was introduced. The "motion

There was no such stipulation in this case.

This leaves only the testimony taken on hearing of the motion.

8. The Evidence Sustains, Indeed Required, the Finding of the Trial Court That There Was No Improper Exclusion of Any Class of Persons From the Jury List to Petitioner's Prejudice.

Petitioner's first burden on the hearing of the motion was to identify and describe himself,—to show that he was a member of some class claimed to have been excluded improperly from the jury list. (See pp. 50-57) He failed to meet the burden. Literally **no evidence** was offered to identify or describe him. From the proof it is impossible to say whether petitioner is male or female, old or young, white, black, yellow or red, citizen or alien, Jew or gentile, Catholic, Protestant, Buddhist or professing to be soulless as a corporation, rich, comfortable or poor, employer, employed or unemployed, a worker on salary or commission or following an independent calling on a fee basis, skilled or unskilled, hard working, a gentleman of leisure or a play-boy, capitalist or "bum."[105] The only showing in any form was as follows: (a) The complaint, by alleging petitioner's name and the use of pronouns, in-

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was supported by affidavits of the attorney of plaintiff in error." This is insufficient; it "did not dispense with the necessity of actual presentation or offer of specific proof at the time the motion was brought up for action thereon."

105. Six witnesses were called. Two were lawyers who had tried and lost cases against respondent. The others were the clerk, jury commissioner, deputy clerk, and the attorney for respondent. Not one mentioned petitioner. Petitioner did not appear in court on the hearing of the motion (R. 68).

dicated that plaintiff was a male[106] and alleged that he was "28 years of age * * * and was employed as a salesman and was earning about $200.00 per month"[107] (R 3-5). (b) Petitioner's attorney's affidavit (see p. 59 et seq. above) stated that before the accident petitioner "was regularly employed as a wage earner" (R 12). (c) On the hearing of the motion, in response to a question from the Court, petitioner's attorney stated that petitioner was a "white man or Caucasian" (R 33).[108]

Even if we assume this showing can be looked to, to what class, with common interests and prepossessions, does a 28-year-old salesman (on salary or commission not shown), earning about $200 per month in 1940, belong? Can he claim to belong to the "laboring" or "working" class, even if we assume these words are sufficiently unambiguous to describe a readily recognizable class of eligible jurymen having a common outlook?

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106. Respondent's answer, in the same way, assumed that petitioner was a male.

107. These averments were denied by the answer for want of information sufficient to form a belief (R 6).

108. The petition says that petitioner was a machinist or mechanic. There was no such showing before the court on the hearing of the motion.

On the trial of the case petitioner did give some testimony as to his occupation. But this was not before the court on the hearing of the motion to strike out the jury panel, or at the time of the impanelment of the jury, or when petitioner's attorney, after the jury was sworn, undertook "to enter a challenge to the twelve jurors chosen to try this case."

Petitioner's testimony on the trial adds little. He testified: Before the accident he was "a salesman" for Mann Construction Co. in the business of "asbestos, housing, shingles, etc.," working on a commission and earning about $200 per month. Before that he had worked at "Foster's, I think—Foster's Lunch" at $17.50 per week plus his meals. Before that he was a mechanic or machinist working at $40 a week (f 640-642).

Assuming that petitioner sufficiently identified himself as a salesman, or of the working or laboring class, or class of persons of modest income (salary or commission), did he prove to the point necessary to overcome a contrary finding, or produce any evidence, that members of his assumed class were systematically and purposely discriminated against and wrongfully excluded in making up the jury list?

The first answer is that petitioner utterly failed to make such showing because he utterly failed to present evidence to show the composition of the jury list. So far as evidence offered by the petitioner on the hearing of the motion is concerned, every person on the jury list may have been an unskilled worker engaged in working with his hands for a daily wage. (Compare *Merriweather v. Commonwealth*, 118 Ky. 870, 82 S.W. 592 (1904) and cases at pp. 48-50, 60, 61 above.)

The only testimony on the hearing of the motion which threw any light on the composition of this panel[109] was that of the clerk, Mr. Maling, and of Mr. Calbraith, deputy clerk since 1912 (R 52-58). Mr. Calbraith testified: 161 were summoned, 56 were excused, and 105 were on the panel. The summoned jurymen were examined by Judge Roche for qualifications and offered their excuses. Their qualifications were tested against the provisions of the California statute. There was no check, at that time, on the occupation of those who did not offer excuses. From those who offered excuses (not all were allowed), it appeared that at least 25% could be classified as work-

109. This is the only one with which petitioner can have any concern. (*State v. Wilson*, 204 La. 24, 14 So.2d 873, 882 (1943). Cf. *Williams v. Mississippi*, note 77 above.)

ing or laboring people,—who worked with their hands for a daily wage (R 52, 53, 55, 56). It would not be proper to say that most of the jurors on the panel were of the wealthy class (R 56, 57). Among those who offered excuses and, by consequence, were examined and disclosed their occupations, there were: A saleswoman at a department store, leaderman in a shipyard, labor negotiator, employee of the San Francisco Water Department, department store employee, checker-clerk and watchman at a freight terminal, time checker at Hunter's Point (shipyard), stenographer for a drayage concern, employee of piece-work-payment-and-accounting department of Bethlehem Steel Co., employee of traffic and inventory control department of Wadsworth California Co., accountant with a retail jewelry store, manager of a branch men's hat store, journeyman electrician at a shipyard, switchman for the telephone company (R 53, 54).

Mr. Maling testified that he was informed that when the venire was returned, a good many offered the excuse they could not serve because they would lose their pay; that a good many were laborers in shipyards and other places where the Government would be losing workmen they would be needing for War work (R 31).

In the absence of other showing, it must be presumed that there was no improper exclusion from the panel of 105 who served, and that members of the class claimed to have been excluded were in fact on that panel (pp. 48-50, 60, 61 above).

The information obtained on the actual impanelment of the jury in this case was not before the court when it ruled on the motion to strike the panel, but it is interest-

ing that it confirms the presumption. What is to be presumed in the absence of proof was shown to be the fact when, later, proof was made. The details are summarized in Appendix B.

Of the twelve who served, the trial court found: (a) five belonged "with the working man and employee class" and "would be expected to be sympathetic with" working people (see p. 8 above),—two retired railroad postal employees, one working in a shipyard and the other as a janitor, the widow of a clerk, a salesman for a stationery concern, and a retired steel erector; (b) three were important business men,—two insurance brokers and a department manager, not an owner, of an import and export business; (c) four were not readily to be classified,—the wife of a florist, a retired commission merchant, a man in "general insurance" and a rice broker selling on commission. Of the thirteen whose names were called and who were challenged and excused, the following appeared: Two had some connection with petitioner's attorney and one had been an acquaintance of respondent's attorney for some years. By occupation, three were housewives (a liquor salesman's wife, a civil engineer's wife and an army captain's wife), one was a bookbinder, one was office manager for a foodstuffs concern, two were salesmen (one for a law publishing house and the other for a concern selling drawing and blueprint materials), and the others were an insurance broker, an insurance company manager, president of a heavy machinery concern, a bank vice president, vice president of a real estate [sic] concern and a director of Haas Bros [wholesale grocers].

That there was no exclusion in fact of the class claimed to have been excluded answers the claim of systematic

arbitrary and purposeful discrimination against, and exclusion of, that class (see p. 38 above).

The method of selecting the jury panel was testified to by Mr. Maling, clerk of the Court for over 30 years (R 27), by Mr. Mikulich, jury commissioner for about 3 years (R 27, 46), and by Mr. Calbraith, deputy clerk.[110] The facts were testified to principally by Mr. Maling. Mr. Mikulich heard Mr. Maling's testimony and said his answers to the same questions would be about the same (R 46). The testimony shows:

The method has been the same during the period that Mr. Maling was clerk (R 35, 39).[111]

No attention is paid to the state statutes or practice except as to qualifications (R 29, 34, 49).[112] The clerk and commissioner each selected half of the names to go into the box (R 27). When the names were drawn, there were always 300 names in the box. The same box was used for both grand and petit juries (R 35, 36).

From city directories[113] were taken the names of people

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110. Mr. Maling's testimony is at R 27-46, Mr. Mikulich's at R 46-52 and Mr. Calbraith's at R 52-58.

111. There is a presumption in favor of a practice which has been followed this long. Compare *State v. Mercier*, 98 Vt. 368, 127 Atl. 715, 716 (1925). Presumably the district judges knew local conditions and found it proper in the circumstances. (Cf. *Pierre v. Louisiana*, 306 U.S. 354, 362, 83 L.ed. 757, 762 (1939); *Neal v. Delaware*, 103 U.S. 370, 26 L.ed. 567 (1881).)

112. Mr. Maling did not recall the California code sections by number, but made it clear that he was guided by the substance of the California statute. The commissioner made it clear that the machinery—the practice followed—was not the State practice (R 49). The petition misconstrues this testimony.

113. Such use of city directories is proper. (*People v. Walsh*, 322 Ill. 195, 153 N.E. 357 (1926).) There was no deliberate selection of jurymen from the membership of a particular private organization, condemned in *Glasser v. United States*, supra.

who, from occupation and residence, it seemed would make intelligent jurors (R 28).[114] "What organization or what company they are associated with does not enter into it at all" (R 28). **Names have never been selected because of occupation** (R 29). Occupation may be some guide to age. If a man is working as a clerk for a department store, he is probably the right age. **"But that is the only way that I can recall now that the occupation would have anything to do with it"** (R 29). Of course, where the occupation showed a connection with a reputable firm, that knowledge was not disregarded; it was assumed that a person connected with a reputable firm was himself reputable (R 37).[114]. No attempt was made to select business executives (R 36, 37). Some business executives were selected, but so were other employees of business concerns.[115]

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114. The California statutes (C.C.P. §205) call for "fair character and approved integrity" and "sound judgment." See App. A, p. 11.

115. Mr. Maling was asked if he selected primarily business men and business executives. He replied: "Well, not business executives,—if you mean by that that I went out of my way to select a large number of the officers of companies, if that is what you meant by an executive. **I never have done that.**" (R 36, 37) He did not know what their salaries were. About 50% were from the business group. This meant people occupying important positions in business firms or in business and "**also their employees**, who were salesmen and saleswomen, and that sort of thing, the clerks, and bookkeepers, and all that sort of thing. I took all of those people. I did not intend, when I used the word business men, to have you get the idea that I meant all presidents, vice presidents of a corporation or anything like that." The people taken "are working for all sorts of merchants, big and little." (R 37, 38)

The Commissioner testified: "I have tried to keep away from the business end"; "Q: In your selection, do you omit from the jury list wage earners and laborers? A: No." (R 46, 47)

Certain names were avoided. The endeavor was to avoid those people who were disqualified, exempt, or who would surely be excused by the court (R 29, 42, 43, 50).[116]

In line with not putting into the box names of persons certain to be excused by the Court, the names of certain "laborers" or "wage earners" or "working men" were avoided. **But only certain people of this sort were avoided, —only those who work for a daily wage, for whom, on this account, jury service would represent a severe financial loss and who, for this reason, were excused by the Court** (R 29-32, 36, 47, 48).[117] This was the only reason

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116. Those avoided included physicians, pharmacists, telegraphers, and men who operate trains, school teachers, ministers, state and federal officials, and people of that class, who are always excused. (R 29) "Q: One other thing: you aim to keep names out of the box of persons who, either by reason of exemption of the state statute, or by reason of the practice here, that **the judge would excuse** if and when they came to be sworn? **A: Those are the only ones I endeavored to keep out of the box.**" (R 43) "Q: Is it correct that **your only exclusion** in that respect is as Mr. Maling expressed it, that you endeavor not to put into the box the names of those persons, persons of **the type that you know from experience the court will excuse** when the time comes for examination of the juror and swearing in of the panel? **A: That is what we try to do. Q: But otherwise you make no discrimination whatsoever? A: No.**" (R 50)

117. Experience showed that the court always excused men who worked for a daily or hourly wage when they asked to be excused on that account. "The minute that a juror is called into court on a venire and says he is working for $10 a day and cannot afford to work for four, the judge has never made one of those men serve" (R 29, 30). If they give such excuse "my experience has been that every one of the judges has always excused those men who said they could not afford to come here and give up their ~~$10, or $12, or $15~~ a day for the $4 a day that the Government pays them" (R 30, 31). "I said that day laborers, who were dependent upon their daily wage and were getting $10 or $15 a day would always be excused, in my observation, if they came up here and were required to serve as jurors in our court at $4 a day, and so I did not put in the names of those men I thought would be in that category" (R 36). The commissioner's testimony was the same (R 47, 48).

these people were excluded.[118] They were not excluded because of class prejudice. Their wives were taken (R 44). The practice followed was one which Judge Knox, after thorough study of the question as chairman of the committee of district judges appointed for that purpose, concluded was inevitable in metropolitan areas.[119] (See Judge

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118. Mr. Maling testified that he left out men who worked for a daily wage where it was going to affect them financially and was unfair to them. If he felt sure he "would avoid it for that reason, solely for that reason" (R 30). This was the reason he avoided such names (R 32). "Q: And this distinction that you have made is not on the basis of earnings, or wealth, or character of work, but is a distinction based on whether or not a man will be excused because he will lose money. A: That is the only thing that governs me at all in excluding any of them" (R 42). For some of the commissioner's testimony, see notes 116 and 117.

119. It is no ground of complaint that trial judges excuse from jury service people who cannot afford the loss which such service involves. The granting of excuses for reasons personal to individuals, not amounting to grounds of exemption, is committed to the discretion of the trial court. *United States v. Meyer*, 113 F.2d 387, 395 (C.C.A. 7,—1940—cert. den. 311 U.S. 706, 85 L.ed. 459); *Shettel v. United States*, 113 F.2d 34, 36 (U.S.C.A. for D.C.,—1940); *People v. Hickman*, 113 Cal. 80, 84, 45 Pac. 175 (1896); *People v. Arceo*, 32 Cal. 40 (1867); *People v. Patterson*, 58 C.A.2d 837, 843, 138 P.2d 341 (1943,—court may excuse for "good cause and legitimate reason"); *Mullins v. State*, 24 Ala. App. 78, 130 So. 527 (1930), cert. den. 222 Ala. 9, 130 So. 530 (1930); *Bone v. State*, 200 Ark. 592, 140 S.W.2d 140, 142 (1940); *Hallum v. Blackford*, 202 Ark. 544, 151 S.W.2d 82 (1941); *State v. Hayes*, 162 La. 310, 110 So. 486 (1926); *State v. Dallao*, 187 La. 392, 175 So. 4 (1937), app. dis. and cert. den. 302 U.S. 635 and 636, 82 L.ed. 494 and 495, reh. den. 302 U.S. 776 and 777, 82 L.ed. 601; *Mathews v. State*, 19 Okla. Cr. 153, 198 Pac. 112, 116 (1921); *Commonwealth v. Payne*, 205 Pa. 191, 54 Atl. 489 (1903); *State v. Ward*, 60 Vt. 142, 14 Atl. 187 (1888); *Blakey v. Commonwealth*, 182 Va. 614, 29 S.E.2d 863, 865 (1944).

It is proper to excuse a juror because of his private business affairs (*People v. Thacker*, 108 Mich. 652, 66 N.W. 562 (1896); *State v. Savan*, 148 Ore. 423, 36 P.2d 594 (1934); *State v. Browning*, 116 S.C. 252, 108 S.E. 105 (1921). It is proper not to call jurors who will be required to travel long distances, particularly in view of conditions incident to war. (*People v. Pat-*

Knox's address to the Denver Bar Association, Oct. 16, 1944, 21 Dicta, 283, 285 and his testimony printed in Hearings before the Committee of the Judiciary, House of Representatives—Seventy-ninth Congress, First Session—hearing on H.R. 3379, 3380, 3381—June 12 and 13, 1945—Serial No. 3, pp. 8, 13.)

It is proper for the clerk and the jury commissioner to avoid the names of those persons who will surely be excused by the court. (*Rawlins v. Georgia*, 201 U.S. 638, 50 L.ed. 899 (1905); *Carter v. State*, 143 Ga. 632, 85 S.E. 884 (1915). Cf. the practice noticed in *United States v. Brady*, 47 Fed. Supp. 362 (1942), aff'd 133 F.2d 476 (C.C.A. 4, 1943—cert. den. 319 U.S. 746, 87 L.ed. 1702, reh. den. 319 U.S. 784, 87 L.ed. 1727). Compare *Midkiff v. State*, 29 Ariz. 523, 243 Pac. 601, 605 (1926); *People v. Patterson*, 58 C.A.2d 837, 843, 138 P.2d 341 (1943); *Blakey v. Commonwealth*, 182 Va. 614, 29 S.E.2d 863, 865 (1944).)

It is not to be understood that all laborers, or wage earners, or working people, were left out as a class. They were taken, whatever the character of their work and whatever their occupation, if they were employed at a monthly rate, or otherwise so situated that by serving they did not suffer financial loss which they could not

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terson, supra; *Blakey v. Commonwealth*, supra.) It is proper to excuse a juror so he may attend college (*State v. Hayes*, supra), and a juror whose national guard regiment is in camp (*State v. Lang*, 75 N.J.L. 1, 66 Atl. 942 (1907), aff'd 75 N.J.L. 502, 68 Atl. 210, aff'd 209 U.S. 467, 52 L.ed. 894 (1908).

Compare *People v. Chrisoulas*, 367 Ill. 85, 10 N.E.2d 382 (1937), where it was held proper to ask prospective jurymen in what three months' period of the year they preferred to serve and assign them for service according to their preferences.

afford (R 30, 36, 37, 42).[120] The commissioner had made a special effort to obtain the names of people who were members of labor unions (R 48, 50).

No attention was paid to financial status—indeed, it was not known (R 43, 45, 46, 51).[121]

No attention was paid to the proportion of men as against women, i.e., there was no attempt to either raise or lower the proportion of men to women (R 32; cf. 48[122]), and there was no discrimination between women because of their husband's occupations (R 44).

There has been no discrimination against negroes or Chinese; they have been on the panels (R 32, 33).[123]

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120. Mr. Maling gave as an example of a man dependent on a daily wage who could not afford to give up his employment, a longshoreman. He said that he did thus just by way of illustration; that he did not exclude the longshoreman just because he was a longshoreman. If a man were engaged in loading and unloading vessels, freight cars, or trucks, on a monthly wage, he would not be excluded. There was an officer of one of the unions on the panel (R 42). A man was not left out because he was a carpenter. He might be on a monthly wage. That he was a carpenter did not indicate he was dependent on day labor. A janitor would be taken. Janitors have served a number of times. A man would not be left out because he was a mechanic (R 30, 31). All wage earners and laboring people are not left out (R 36). If a man were listed as a laborer he could serve if he wanted to serve (R 48).

121. "Q: Might I ask you if it is not a fact that you do select, primarily, those who are of the wealthy group, business men and such? A: No, that is not true" (R 51).

122. The commissioner pointed out the difficulty in getting women to serve,—"it is rather a hardship on women who have their homes, with the burden of housekeeping, motherhood, and the rest" (R 48). This would be particularly true of the type of women petitioner claims should not be excluded, that is the wives of working men and laborers. The moment a woman's husband earned enough to permit them to employ a servant to take care of the house and children, the woman would pass out of the class that petitioner insists should serve.

123. On the hearing of the motion, respondent's counsel stated that there was a negro on the panel from which the jury in this case was drawn. The statement was not challenged (R 32).

The heart of the whole matter appears in the following testimony:

"Q. Now, has there been any purposeful exclusion of Negroes or Chinese?

A. No.

Q. Has there been any purposeful exclusion of men who worked with their hands?

A. Never.

Q. Or any exclusion of men of small salary, whether by day, or otherwise, simply because their salaries were small?

A. Never.

Q. Has there ever been any exclusion of any person simply because he was poor?

A. Oh, no.

Q. Has there ever been any exclusion of any individual who worked at any particular trade, simply because he worked at that trade?

A. No" (R 41, 42).

"Q. As I understand you, you paid no attention whatever to whether the prospective jurors were wealthy or poor, in fact, you knew nothing absolutely about their financial condition, is that correct?

A. I don't know a thing about their financial condition.

Q. And have never attempted to make any selection based on their financial standing?

A. Never.

Q. And the same goes with respect to the women, you have never attempted to make any selection of women based on whether their husbands were engaged in one line of endeavor or another line of endeavor?

A. That is correct.

Q. Or whether they were rich or poor?

A. That is correct.

Q. You just pick them as they come?

A. Yes" (R 45).

"Q. In your selection, do you omit from the jury list wage earners and laborers?

A. No" (R 47).

"Q. Have you ever excluded or attempted to exclude any person or class of persons because of the nature of the work they do?

A. No.

Q. Or because of the amount of pay they receive?

A. No.

Q. Or because of their wealth?

A. No" (R 50).[124]

This quoted testimony of the clerk and the jury commissioner that there was no discrimination is enough, without more, to sustain the finding of the trial court (compare *Akins v. Texas*, and the other cases at p. 48 et seq. above and see, dealing with somewhat similar testimony, *Midkiff v. State*, 29 Ariz. 523, 243 Pac. 601, 604 (1926); *Langrum v. State*, 128 Tex. Cr. 23, 78 S.W.2d 973 (1935)).

In actual operation, about 50% of the panel could be classified as business men or business people, from various businesses of all sizes, large and small,—that is people connected with business or employed by business concerns,[125]—and their wives. The other 50%, more or less,

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124. This is immediately followed by the last two questions and answers quoted in note 116 above.

125. This would include "laboring" people employed by business concerns, large and small (R 36, 37, 46, 47). See note 115 above.

belonged in the other classes (R 32, 35 36 38, 46, 47, 51, 58).

The only other testimony was that of two disgruntled lawyers, each of whom had tried and lost a case against respondent in the Federal court,[126] and some testimony in reply by respondent's attorney.[127]

9. The Petitioner's Position Is Not Sound in Law or in Fact.

A number of misconceptions lie at the root of the positions taken in the petition.

The petition assumes that this court is to consider the matter *de novo*. It overlooks the fact that the question presented to the trial court was essentially a question of fact and that on review in this court the only question is whether there is evidence sufficient to sustain the finding (see pp. 42-50 above).

The petition assumes that it was the duty of the clerk and the jury commissioner affirmatively to see to it that

126. These men testified that the juries before whom they tried their cases (long before this case was tried) were typical Federal court juries. They ventured the conclusions, unsupported by detail, that these juries did not have on them any working or laboring people (R 16-27). Compare note 127, which gives the facts.

127. The testimony of respondent's attorney showed (R 58-68): In the case tried by the first of these attorneys, the plaintiff exercised only two peremptory challenges; there were on the jury in that case a man in the investment business, not the proprietor, a retired manufacturers' agent who had had his own small business representing eastern mills, an employee of a textile manufacturer, a retired United States Post Office bookkeeper, an employee, not one of the principal manufacturers, of a meat packing concern, two men connected with life insurance companies in minor capacities, secretary of the Mechanics' Institute, a retired calker and a millwright. On the jury in the other case there were a retired member of the San Francisco Fire Department, an architect, an engineer, a time keeper, a department store salesman, a retired army man, a man who was unemployed.

all classes of eligible persons were represented on the jury list and, more particularly, that they should have anticipated the class to which petitioner might claim to belong,—a class as yet undefined by him,—and were remiss in performing their functions, if such class were not included. As a practical matter, it would be impossible to prepare such a list as petitioner assumes he was entitled to demand (see notes 60 and 63 above, and see our Answer to Petition for Certiorari, pp. 15, 16). As a matter of law, petitioner had no right to the inclusion of any class or person. He was entitled a jury, not a board or arbitrators to which he could nominate his partisans. His right was only that there should be no intentional arbitrary and unjustifiable exclusion of any eligible class (see pp. 27-34 above).

The petition assumes that there was an improper exclusion of Chinese, negroes, women and working people. Passing the proposition that petitioner has failed to take the first step toward showing that he was prejudiced, by showing the class to which he belonged and which he claims was excluded (see pp. 62, 63 above), the short answer is that there was not in fact an exclusion of any of these classes. There was no attempt to exclude working people. In fact they appeared on the jury list and on the jury that tried this case.

If the motion below represents more than just a tactical attempt to insure against the event of an adverse verdict, and the argument reflects a conviction, not just an attempt to collect the insurance, there inheres a deeper vice than the improper assumptions of law and fact. The argument displays unwarranted pessimism about and fatuous dis-

trust of American political and juridical ideals and aspirations, and deprecates American social labors to realize them. It is one of our political ideals that before the law there is no distinction between rich and poor, between worker and hirer; that what each deserves is measured by his conduct. It is one of our juridical aspirations that reason, not emotion, will guide judicial determinations.

What the argument really criticizes is an attempt to select a panel that would decide rationally. It expresses chagrin that the presence of a plaintiff in a wheelchair could not make a sufficiently strong emotional appeal to override the evidence. It expresses surprise that a defendant in a personal injury case should be willing to submit the case to a jury. It looks upon juries as the private preserve of plaintiffs in personal injury cases. The Seventh Amendment does not guarantee the right of trial by jury to plaintiffs in personal injury cases. It says that "in suits at common law,"—all suits, and for a defendant as well as for a plaintiff,—"the right of trial by jury shall be preserved." What sort of a jury system is it that the petition asks when it assumes that a defendant should not be willing to go to trial before a jury so selected and drawn?

Whatever the situation might be if a labor dispute, or an action growing out of a labor dispute, were to be submitted to the jury, there is no basis for arguing that in a case of this sort a man working with his hands for a daily wage, if intelligent,—"of fair character and approved integrity, and of sound judgment" (Cal. C.C.P. §205),—would act differently from a white-collar worker, a man in a managerial position on salary, or a proprietor of a business.

Mere social or economic position, even poverty, without more, does not necessarily indicate want of intelligence or a disposition to reach conclusions by emotion. It is equally true that advancement by intelligent personal effort does not indicate want of fairness or integrity. We do not admit that there is any such American caste system that self-attained economic security is not some indication of intellectual capacity, or is an indication of bias against those who are less able or less fortunate. There is a connection between self-attained advancement and mental capacity, not only for business, but as well for the performance of important duties of citizenship; a connection that our institutions are designed to allow for.

The argument asks this Court to legislate an artificial stratification into classes for the purpose of jury service. It asks a legal stratification against the elimination of which our polity and economy are directed. It attempts to plant itself on decisions of this Court on questions arising out of the negro problem in the south and to pervert the design of those decisions; it attempts to rest on the decision of questions arising out of a situation still grasped by the hand of history—a grasp those decisions aimed to loosen.

CONCLUSION

It is respectfully submitted that there was no impropriety in the conduct of the clerk and the jury commissioner in selecting names to go into the jury box; that the decision of the trial court to that effect is amply supported by the evidence, that the challenge to the array was properly denied and, by consequence, that the judgment must be affirmed.

Dated at San Francisco, California, this 12th day of March, 1946.

ARTHUR B. DUNNE
Attorney for Respondent

(APPENDIX FOLLOWS)

Appendix A

STATUTES DEALING WITH SELECTION OF FEDERAL PETIT JURIES

FEDERAL STATUTES.[1]

Judicial Code, §275, 28 U.S.C.A. §411.[2] (R.S. §800; June 30, 1879, c. 52, §2, 21 Stat. 43; Mar. 3, 1911, c. 231, §275, 36 Stat. 1164.) **Jurors; qualifications and exceptions.** Jurors to serve in the courts of the United States, in each state respectively, shall have the same qualifications,[3] subject to the provisions hereinafter contained, and be entitled to the same exemptions,[3] as jurors of the highest court of law in such state may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned.

Judicial Code, §276, 28 U.S.C.A. §412.[4] (June 30, 1879, c. 52, §2, 21 Stat. 43; Mar. 3, 1911, c. 231, §276, 36 Stat. 1164;

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1. We use the wording of the United States Code.

2. This section, with §4 of the Civil Rights Act of March 1, 1875 (8 U.S.C.A. §44), Judicial Code, §278, 28 U.S.C.A. §415 and Judicial Code §286, 28 U.S.C.A. §423 are the only Federal statutes dealing directly with general qualifications and exemptions of jurors. No Federal statute restricts the power of judges of Federal courts to excuse qualified and non-exempt jurors, in the exercise of their discretion, on a showing personal to the juror not amounting to an exemption. 50 U.S.C.A. §57 deals with employees of U.S. arsenals.

3. The California statutes are set out below.
Only "qualifications" and "exemptions" are determined by state law. "In respect to the qualifications and exemptions of jurors to serve in the courts of the United States, the state laws are controlling. But Congress has not made the laws and usages relating to the designation and impaneling of jurors in the state courts applicable to the courts of the United States" except as the statutes of the United States, before 1911, permitted adoption of state practice by rule or order. (*Pointer v. United States*, infra note 4, and note 4.)

4. The method of obtaining the names has not always been the same. Under R.S. §800 the Federal courts could "by rule or order,

Feb. 3, 1917, c. 27, 39 Stat. 873.) **Same; manner of drawing.** All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in the section last preceding, which names shall have been placed therein by the clerk of such court, or a duly qualified deputy clerk, and a commissioner, to be appointed by the judge thereof, or by the judge senior in commission in districts having more than one judge, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political

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conform the designation and impanelling of juries, in substance, to the laws and usages relating to jurors in the State courts". Under the Act of 1879 any judge could order "the names of jurors to be drawn from the boxes used by the State authorities in selecting jurors." (See *Pointer v. United States*, 151 U.S. 396, 406, 38 L. ed. 208, 213 (1894); *Thompson and Merriam, Juries* (1882), §48 et seq.) But even under these provisions the state practice was not followed in the absence of a rule or order of court. "Congress has not made the laws and usages relating to the designation and impaneling of jurors in the respective state courts applicable to the courts of the United States, except as the latter shall by general standing rule or by special order in a particular case adopt the state practice in that regard. In the absence of such rule or order * * * the mode of designating and impaneling jurors for the trial of cases in the courts of the United States is within the control of those courts, subject only to the restrictions Congress has prescribed." (*Pointer v. United States*, supra, quoted in *St. Clair v. United States*, 154 U.S. 134, 147, 38 L. ed. 936, 941 (1894); *Apgar v. United States*, 255 F. 16, 18 (CCA-5, 1919—cert. den. 250 U.S. 642, 63 L. ed. 1185).)

The provisions permitting use of the state practice, or names from the state boxes, were removed in 1911. Since then the only method of getting names has been that of the designated Federal court officials placing names in a Federal jury box. The Federal court officials designated in the statute can not delegate their functions. (*Glasser v. United States*, 315 U.S. 60, 85, 86 L. ed. 680, 707, (1942); *Dunn v. United States*, 238 F. 506 (CCA-5.—1917—holding that before the 1917 amendment the Clerk's deputy could not act for the Clerk).)

party in the district in which the court is held opposing that to which the clerk, or a duly qualified deputy clerk then acting, may belong, the clerk, or a duly qualified deputy clerk, and said commissioner each to place one name in said box alternately without reference to party affiliations[5] until the whole number required shall be placed therein.

Judicial Code, §277, 28 U.S.C.A. §413. (R.S. §802; Mar. 3, 1911, c. 231, §277, 36 Stat. 1164.) **Same; apportioned in district.** Jurors shall be returned from such parts of the district,[6] from time to time, as the court shall direct, so as

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5. This reference to political affiliations was introduced by the statute of 1879. This is the first mention in a Federal statute or Federal decision, of party affiliations as a matter for consideration in the selection of names for jury lists.

6. It has been held, repeatedly, that names need not be returned from the whole district. To the contrary, the court may direct that jurors be returned from a part of the district only, under the plain wording of the statute. A jury drawn from names of persons residing in a part only of the district is not subject to challenge on that account. The court can "draw and summon jurors from the entire district" but "it was not necessary, however, that this be done." (*Lewis v. United States*, 279 U.S. 63, 72, 73 L. ed. 615, 619 (1929). Acc., *Agnew v. United States*, 165 U.S. 36, 42, 41 L. ed. 624, 626 (1897); *Ruthenberg v. United States*, 245 U.S. 480, 482, 62 L. ed. 414, 418 (1918); *Jarl v. United States*, 19 F. 2d 891, 894, 895 (CCA-8, —1927—citing earlier cases); *Frantz v. United States*, 62 F. 2d 737, 738 (CCA-6,—1933—following the *Jarl Case* and citing the *Lewis* and *Ruthenberg Cases*); *Needham v. United States*, 73 F. 2d 1, 2 (CCA-7,—1934—cert. den. 294 U.S. 705, 79 L. ed. 1241); *Walker v. United States*, 93 F. 2d 383, 392 (CCA-8,—1937—cert. den. 303 U.S. 644, 82 L. ed. 1124); *Seadlund v. United States*, 97 F. 2d 742, 747 (CCA-7,—1938); *Walker v. United States*, 116 F. 2d 458, 462 (CCA-9,—1940).)

In the *Ruthenberg* and *Seadlund Cases* it was held that the 6th Amendment does not require that the jury be drawn from the whole district and Judicial Code §277 is referred to as indicating that the practice has been otherwise. The *Ruthenberg Cases*, answering the argument that the jurors were not drawn from the entire district, said: "The proposition disregards the plain text of the 6th Amendment, the contemporary construction placed upon it by the Judiciary

to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service.

28 U.S.C.A. §414 deals with juries in the District of Indiana.

8 U.S.C.A. §44.[7] **(Mar. 1, 1875, c. 114, §4, 18 Stat. 336.) Exclusion of jurors on account of race or color.** No citizen

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Act of 1789 (Chap. 20, 1 Stat. at L. 73, 88, §29) expressly authorizing the drawing of a jury from a part of the district, and the continuous legislative and judicial practice from the beginning. [Sec. Rev. Stat. §277, Judicial Code [36 Stat. at L. 1164, Chap. 231, Comp. Stat. 1916, §1254]. (Citing earlier cases.)"

7. This is the first Federal statute to deal in terms with exclusion from jury service of any class of person. It was one of the statutes adopted as part of the Congressional scheme of "reconstruction" after the war between the States. It was part of the attempt to secure to the negroes enjoyment of recently acquired civil rights.

On Dec. 18, 1865 the Secretary of State proclaimed the adoption of Amendment XIII. Two companion measures were then introduced in Congress, the Freedman's Bureau Bill and the Civil Rights Bill of April 9, 1866, c. 31, 14 Stat. 27 (see 8 U.S.C.A. §41). The Civil Rights Bill did not in terms refer to jurors. It did secure to all "the same right * * * to make and enforce contracts, to sue, to be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens." In *Strauder v. West Virginia*, 100 U.S. 303, 25 L. ed. 664, (1880) a statute confining jurors to "white males" was held to violate Amendment XIV. As part of its argument the opinion quotes the provisions of the Act of 1866 and says they "partially enumerate the rights and immunities intended to be guaranteed by the Constitution". The clear implication is that the Act was broad enough to strike at discrimination for race or color in selecting names for jury lists. But that case was not decided until 1880.

There were grave doubts as to the constitutionality of the Act of 1866,—whether it was sustained by Amendment XIII. (The question was argued in *Blyew v. United States*, 13 Wall. 581, 20 L. ed. 638 (1872) but the court found it unnecessary to pass on the question.) One of the purposes of Amendment XIV was to remove these doubts. (See *Civil Rights Cases*, 109 U.S. 3, 22, 27 L. ed. 835, 843 (1883); Mr. Justice Field, dissenting in *Ex parte Virginia*, 100 U.S. 339, 25 L. ed. 676 (1880), and in *San Mateo v. So. Pac. R. Co.*, 116 U.S. 145, 149 (1882); *Flack, Adoption of the Fourteenth Amendment*, esp. at 40; *Swisher, American Constitutional Development*, 312-316; *McLaughlin, A Constitutional History of the United States*, stud. ed., 653.) Amendment XIV was proclaimed by the Secretary of

possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than $5,000.00.

State on July 28, 1868. The first acts for the enforcement of Amendments XIV and XV were adopted in 1870 and the Civil Rights Bill of April 9, 1866 was "re-enacted with some modifications in sections 16, 17, 18 of the Enforcement Act passed May 31, 1870" c. 114, 16 Stat. 144. (*Civil Rights Cases*, 109 U.S. at 16, 27 L. ed. at 841; *San Mateo v. So. Pac. R. Co.*, supra at 151.)

Charles Sumner was insisting that a supplementary civil rights bill be adopted and on May 13, 1870 introduced a bill which became the Civil Rights Act of Mar. 1, 1875. (*Storey, Charles Sumner* (30 Am. Statesmen Series), 401 et seq.; *Flack, op. cit.*, 218). See Report of Attorney General (1873), p. 17.

The Act of Mar. 1, 1875 was the "culmination of the efforts of Congress to enact laws for the enforcement of the Fourteenth Amendment". (*Flack, op. cit.*, 277) "With this the record of partisan legislation on reconstruction was closed." (*Dunning, Reconstruction* (22 Am. Nation Series), 255.) Section 4 of that act is the statute here set out and is now 8 U.S.C.A. §44. *This is the first Federal Statute to deal in express terms with discrimination in selecting names for jurors.* (It was anticipated in Tennessee in 1868 and in Louisiana in 1870. *Proffatt, Jury Trial*, §116 at p. 163.)

Section 4 of the Act of Mar. 1, 1875, was sustained, as applied to state officers, in *Ex parte Virginia*, 100 U.S. 339, 25 L. ed. 676 (1880). (And see *Neal v. Delaware*, 103 U.S. 370, 385, 26 L. ed. 567, 570 (1881); *Civil Rights Cases*, 109 U.S. 3, 16, 27 L. ed. 835, 841 (1883); *Gibson v. Mississippi*, 162 U.S. 565, 580, 40 L. ed. 1075, 1078 (1896). But in 1883 §§1 and 2 of the Civil Rights Act of Mar. 1, 1875 were held to be beyond the power of Congress (*Civil Rights Cases*, 109 U.S. 3, 27 L. ed. 567 anticipated in *United States v. Harris*, 106 U.S. 629, 27 L. ed. 290 (1883)). This left §4 as the only substantive provision of the Act of Mar. 1, 1875. It now stands alone, torn from its original context. It is easy to forget its background and real purpose. It was part of the Congressional scheme of "reconstruction"; part of an attempt to solve the negro problem. This was its orientation. The primary objective was the problem of the colored citizen rather than the jury system generally.

Judicial Code, §278, 28 U.S.C.A. §415.[8] (June 30, 1879, c. 52, §2, 21 Stat. 43; Mar. 3, 1911, c. 231, §278, 36 Stat. 1165.) **Same; not disqualified because of race or color.** No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States on account of race, color, or previous conditions of servitude.

Judicial Code, §297, 28 U.S.C.A. §416 deals with the issuance and service of writs of venire facias to bring persons into court to serve as jurors.

Judicial Code, §280, 28 U.S.C.A. §417 deals with returning of "jurymen from the bystanders" where the panel is exhausted without obtaining a jury.

28 U.S.C.A. §417a empowers the court to select alternate jurors. This is not required, but is committed to the court's discretion. This section also provides how such jurors shall be impaneled. Compare Fed. Rules of Civ. Pro., Rule 47(b).

Judicial Code, §§282-285, 28 U.S.C.A. §§419-422 deal with grand jurors.

Judicial Code, §286, 28 U.S.C.A. §423. (R.S. §812; June 30, 1879, c. 52, §2, 21 Stat. 43; Mar. 3, 1911, c. 231, §286, 36 Stat. 1166.) **Jurors not to serve more than once a year.** No person shall serve as a petit juror in any district court more than one term in a year; and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned and attended said court as a

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8. This is only a re-enactment in 1879 of §4 of the Act of Mar. 1, 1875, restricted in application to the Federal courts. Whatever doubts there may have been as to the validity of §4 of the Act of Mar. 1, 1875, until it was sustained in 1880 (see note 7 above), there could be no doubt about a statute restricted in application to the courts of the United States.

juror at any term of said court held within one year prior to the time of such challenge.

Judicial Code, §287, 28 U.S.C.A. §424. (R.S. §819; Mar. 3, 1911, c. 231, §287, 36 Stat. 1166.) **Challenges.** When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to six peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to six peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court[9] without the aid of triers.

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9. Appellate courts will give the same deference to the determination of a fact by the trier of facts upon a challenge to the array or to individual jurors, as to any other determination of fact by the court to which that function is committed. *Akins v. Texas*, Oct. Term, 1944, No. 853, U.S. 89 L. ed. (Adv. Op.) 1206, 65 Sup. Ct. Rep. 1279 (1945); *Pierre v. Louisiana*, 306 U.S. 354, 358, 83 L. ed. 757, 760 (1939); *Thomas v. Texas*, 212 U.S. 278, 281, 53 L. ed. 512, 513 (1909); *Gibson v. Mississippi*, 162 U.S. 565, 581, 40 L. ed. 1075, 1079 (1896); *Wood v. Brush*, 140 U.S. 278, 285, 35 L. ed. 505, 508 (1891); *Ex parte Spies*, 123 U.S. 131, 179, 31 L. ed. 80, 90 (1887); *Reynolds v. United States*, 98 U.S. 145, 156, 25 L. ed. 244, 247 (1879); *Press. Pub. Co. v. McDonald*, 73 F. 440 (CCA 2, 1896—cert. den. 163 U.S. 700, 41 L. ed. 320); *Robinson v. United States*, 144 F. 2d 392, 398 (CCA-6—1944—aff'd on certiorari limited to another question, 324 U.S. 282, 89 L. ed. (Adv. Op.) 635 (1945).) The determination of the trial court will not be disturbed unless an abuse of discretion is shown. (*Green v. United States*, 19 F. 2d 859 (CCA-9, —1927—aff'd on certiorari limited to question of wire tapping, 277 U.S. 438, 72 L. ed. 944); *Robinson v. United States*, supra.)

The practice in state courts is the same. (*Herndon v. State*, 178 Ga. 832, 174 S.E. 597, 601 (1934) app. dis. 295 U.S. 441, 79 L. ed. 1530 (1935); *State v. Walls*, 211 N.C. 487, 191 S.E. 232, 237 (1937) app. dis. and cert. den. 302 U.S. 635, 82 L. ed. 494 (1937); *State v. Henderson*, 216 N.C. 99, 3 SE 2d 357, 361 (1939).)

28 U.S.C.A. §425 deals with peremptory challenges "in the trial of a capital offense."

Judicial Code, §288, 28 U.S.C.A. §426 deals with disqualification of jurymen and talesmen "in any prosecution for bigamy, polygamy, or unlawful cohabitation under any statute of the United States."

CALIFORNIA STATUTES—CODE OF CIVIL PROCEDURE.

§198. Persons competent to act as jurors. A person is competent to act as juror if he be:

1. A citizen of the United States of the age of twenty-one years who shall have been a resident of the state and of the county or city and county for one year immediately before being selected and returned;

2. In possession of his natural faculties and of ordinary intelligence and not decrepit;

3. Possessed of sufficient knowledge of the English language.[10]

§199. Who not competent to act as juror. A person is not competent to act as a juror;

1. *Who does not possess the qualifications* prescribed by the preceding section;

2. *Who has been convicted of malfeasance* in office or any felony or other high crime; or

3. *Who has been discharged as a juror* by any court of record in this state within a year, as provided in section 200 of this code, or who has been drawn as a grand juror in any such court and served as such within a year and been discharged; or who, in a county or city and county containing a population of not less than three hundred thousand as ascertained by the last preceding census taken under the authority of the congress of the United States, or

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10. A requirement that the person be "assessed on the last assessment-roll * * * on property belonging to him" was in this section until 1915.

the legislature of the state of California, during the preceding two years shall have actually served on twenty days as a trial juror in the trial of cases in a court of record in this state; but a juror must in any event complete his service as such juror in the trial of a case in which he may be actually engaged. The clerk shall immediately remove from the jury list the name of any juror who becomes disqualified under this section.

4. *A person who is serving as a grand juror in any court of record* in this state is not competent to act as a trial juror in any such court. Any person who is serving as a trial juror in any court of this state is not competent to act as a grand juror in any such court.

§200. **Exemptions From Jury Service.** A person is exempt from liability to act as a juror if he be:

1. A judicial, civil, naval or military officer of the United States, or of this State while on active duty;

2. A person holding a county, city and county, city, town or township office of profit;

3. An attorney at law, or the clerk, secretary, or stenographer of an attorney at law;

4. A minister of the gospel, or a priest of any denomination following his profession;

5. A teacher in a university, college, academy or school;

6. A practicing physician, or practicing licensed dentist, practicing chiropodist, or practicing registered optometrist, or druggist, actually engaged in the business of dispensing medicines;

7. An officer, keeper or attendant of an almshouse, hospital, or other charitable institution;

8. Engaged in the performance of duty as officer or attendant of the State prison or of a county jail;

9. Employed on board of a vessel navigating the waters of this State;

10. An express agent, mail carrier, or a superintendent, employee, or operator of a telegraph or telephone company, doing a general telegraph or telephone business in this State, or keeper of a public ferry or tollgate;

11. An active member of the National Guard of California,[11] or an active member of a paid fire department of any city and county, city, town or village in this State;[12] or any exempt member[13] of a duly authorized fire company;

12. A superintendent, engineer, fireman, brakeman, motorman, or conductor on a railroad;

13. A person drawn as a juror in any court of record in this State, upon a regular panel, who has served as such within a year, or a person drawn or summoned as a juror in any such court, who has been discharged as a juror within a year as hereinafter provided; or a person who is incompetent under Subdivision 3 of the preceding section: provided, however, that in counties having less than 5,000 population the exemption provided by this subdivision shall not apply; or,

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11. Compare Cal. Mil. and Vet. Cod., §391.

12. Cal. Health and Safety Cod., §14855 also exempts "officers and members of unpaid fire companies regularly organized, and exempt firemen."

13. "Every fireman who has served five years in an organized fire company in this State is an 'exempt fireman' ". Cal. Health and Safety Cod., §14856.

14. A practitioner who treats the sick by prayer in the practice of the religion of any well recognized church or denomination, or a reader whose duty is to conduct regular religious services of such church or denomination.

§205 Selection and listing of jurors. The selections and listings shall be made of persons[14] suitable and competent to serve as jurors, and in making such selections they shall take the names of such only as are not exempt from serving, who are in the possession of their natural faculties, and not infirm, or decrepit, of fair character and approved integrity, and of sound judgment.

§602 Challanges of jurors for cause; Grounds of challenge. Challenges for cause may be taken on one or more of the following grounds:

1. *A want of any of the qualifications prescribed* by this code to render a person competent as a juror;

2. *Consanguinity or affinity within the fourth degree* to any party or to an officer of a corporation which is a party;

3. *Standing in the relation of guardian and ward, master and servant,* employer and clerk, or principal and agent, or debtor and creditor, to either party or to an officer of a corporation which is a party, or being a member of the family of either party; or a partner in business with either party; or surety on any bond or obligation for either party, or being the holder of bonds or shares of capital stock of a corporation which is a party; or having stood within one year previous to the filing of the complaint in the action in the relation of attorney and client with either party or with the attorney for either party.

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14. Until 1915 the names were to be taken from "those assessed on the last preceding assessment-roll".

4. *Having served as a juror in a civil action or been a witness* on a previous trial between the same parties, for the same cause of action; or having served as a juror within one year previously in any civil action or proceeding in which either party was plaintiff or defendant.

5. *Interest on the part of the juror* in the event of the action, or in the main question involved in the action, except his interest as a member or citizen or taxpayer of a county, city and county, incorporated city or town, or other political subdivision of a county, or municipal water district.

6. *Having an unqualified opinion or belief* as to the merits of the action founded upon knowledge of its material facts or of some of them.

7. *The existence of a state of mind* in the juror evincing enmity against or bias to either party.

8. *That he is a party to an action pending* in the court for which he is drawn and which action is set for trial before the panel of which he is a member.

CONSTITUTION OF CALIFORNIA.

Art. I §4. "* * * and no person shall be rendered incompetent to be a witness or juror on account of his opinion on matters of religious belief; * * *."

Art. XX §11. "Laws shall be made to exclude from office, serving on juries, and from right of suffrage, persons convicted of bribery, perjury, forgery, malfeasance in office or other high crimes. * * *"

Appendix B

IMPANELMENT OF JURY

We set out here the substance of what occurred when the jury was impaneled. We first deal with the twelve jurors who sat and then with those who were called into the jury box and then challenged or excused. In the case of each we indicate the finding of the trial judge, particularly those stated by him on denial of the motion for new trial. (R. 79-83)

By footnote we indicate such comments of petitioner or his counsel as are answered by the record.

THE TRIAL JURORS WHO SERVED.

With the exception of Mr. Hales (R. 120-122), as to whom there was no challenge, every juror who served was **expressly passed for cause** by petitioner's attorney at the conclusion of petitioner's attorney's voir dire examination of the juror.

The trial judge, on denial of the motion for new trial, dealt specifically with five jurors, Mr. Morgan, Mrs. Hardiman, Mr. Knight, Mr. Lutz and Mr. Bright (R. 80, 81), and found that they "belong more closely and intimately with the working man and employee class than they do with any other class, and as to whether the twelve jurors were fairly representatives of the prevalent occupations, we find these five jurors when compared with the others do not belong to the same occupational class as the remaining seven jurors." (R. 81) Again he said that "we find five of them who I think it may be fairly supposed would be expected to

be sympathetic with the experiences in life, the affairs of life, and with the economic views, of people who belong to the working or employee class. I think that might be expected of those five of the twelve jurors." (R. 82) We deal with these five jurors:

Eugene Morgan (R. 88-92) Retired United States Mail Service employee, working in Richmond Shipyard No. 1. The character of work done in the postal service or the place where it was performed, does not appear.[15] There was no showing that Mr. Morgan was acquainted with any officer, agent or employee of respondent. Petitioner expressly "passed for cause" (R. 91). The trial judge found that Mr. Morgan "was a shipyard worker at the time he was called away from his work to serve on this case, and had been formerly a railway postal employee." (R. 80)

Mrs. Catherine Hardiman (R. 92-94) Housewife. Widow—husband dead going on five years. "He was a clerk." Acquainted with no officials of respondent—"Not a one." Petitioner passed for cause. The trial judge found she "was the widow of a former clerk of the Associated Oil Company, and * * * had never done any work or pursued any occupation". (R. 80)[16]

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15. The petition for certiorari states that Mr. Morgan "had served on the S. P. Co.'s trains" (f. 7, 8). All the record shows is that when asked whether he had ever had any difficulty with respondent, Mr. Morgan said "No, I was sent out on railroad service and I served my time" (R. 92).

16. The record shows only that Mrs. Hardiman's husband had been a clerk. The source of the trial court's information that he had been a clerk for Associated Oil Company does not appear. The petition says that there were two jurors "who might at least appear to be fair. They were the 'steel erector' and the 'widow' " (f. 9).

Frederick W. Knight (R. 99-100) Was "with Schwabacher-Frey."[17] The firm did business with Southern Pacific Co., selling materials. He was asked whether he did "that business all the time" and said "I presume they are, although I don't know." He personally did none of that business. "It is not done by me at all." Was unacquainted with any officials of respondent. Did "know some sometime ago, but it has been a long time ago" and at the present time does not personally know any people working for respondent. Petitioner passed for cause. The trial court found Mr. Knight "was a salesman for a stationery business." (R. 80)[18]

Herbert N. Bright (R. 105, 106) Retired railroad postal clerk. Asked as to acquaintances in respondent he said: "Well, I know Mr. Goldsmith for some years, and I was quite well acquainted with Mr. Hastings, I have not seen him for quite a number of years." Petitioner passed for cause. The trial court found that "at the time of the trial" he was "employed as a custodian or janitor." (R. 81)[19]

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17. A firm of stationers. The juror's precise connection with the firm does not appear. At a later time petitioner's counsel said "it isn't absolutely clear to me whether it was sales-manager, or ordinary salesman", after the court had commented that Mr. Knight "occupied the high position of salesman" (R. 125).

18. The petition states that Mr. Knight "is an important executive, salesmanager, * * * of Schwabacher-Frey Co., a very large corporation in San Francisco, here which does a considerable business with the Southern Pacific Co." (f. 6). It does not appear that Mr. Knight was "an important executive", or "sales manager" (see note 17) or that Schwabacher-Frey was "a very large corporation" or a corporation at all, or that it did "a considerable business" with respondent.

19. The petition states that Mr. Bright "has ridden on many Southern Pacific trains, and is well acquainted with Mr. Goldsmith of the traffic department of the Southern Pacific Co." A record reference given (f. 486 [R. 125]) is simply to a statement of petitioner's counsel. Petitioner's counsel's general line of statements at this

William H. Lutz (R. 122, 123) Retired steel erector. Had neither business dealings with respondent nor acquaintance with any of its officers or employees. Petitioner passed for cause. The trial court found that he "was a retired steel erection man—that is, a working man when he worked." (R. 81)[20]

The trial court said that three jurors "might be termed important business men, having important or leading or outstanding business connections," Maurice A. Gale, Frank Kugelberg and F. M. Hohweisner. (R. 81) The record shows as to these three:

F. M. Hohweisner (R. 101-103) Insurance broker. No business relations with respondent or anyone working for respondent. Had friends among the officials of the Southern Pacific Company who are members of my golf club, but that would not influence me." His only acquaintance with these unidentified officials was "just through meeting them at the golf club." Petitioner passed for cause.[21]

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time was so inaccurate, counsel for respondent was compelled to say "Counsel knows a great many things that do not appear on the record; and while I have the opportunity, I want to say that counsel here has made a number of mis-statements as to what occurred during the impanelment of the jury, and what the jurors said. As to those, I don't want to argue the matter; I simply don't want by my silence to have it understood that I am acceding to any of those statements." (R. 128). The record does not show that Mr. Bright had ridden on any Southern Pacific trains or was well acquainted with Mr. Goldsmith or that Mr. Goldsmith was in the traffic department. It does not show who either Mr. Goldsmith or Mr. Hastings was or what connection either had with respondent.

20. The petition (f. 9) states that it definitely appeared Mr. Lutz was employed in some executive capacity and, based on a telephone conversation of January 22, 1944, (over a year after the case was tried) unvouched for, states that he was a contractor in the steel erection business. There is no support in the record for either of these statements. See note 16 above.

21. The petition goes beyond the record and states of Mr. Hohweisner that he "plays golf and is very intimate socially with many of the officials and officers of the Southern Pacific Co."

Maurice A. Gale (R. 87, 108, 109) Insurance broker. Owns stock in Pacific Greyhound lines which he said he understood was "connected" with respondent.[22] Was asked if he did any business with respondent and said "I have handled insurance of probably three of the company."[23] Petitioner passed for cause.

Frank Kugelberg (R. 118, 119). A department manager, not an owner, of an importing and exporting business. Did a moderate amount of business, not to exceed $5,000 per

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22. At a later time, after the jury was sworn, (R. 124), a question arose as to the "connection" between Pacific Greyhound lines and respondent. The attorney for petitioner stated that the juror had said Greyhound was "a subsidiary" (R. 127). There was no such statement. Counsel for respondent, in response to the request of the court, stated the connection,—that there was no interlocking directorship relationship; that Southern Pacific Company owned a minority stock interest in the Pacific Greyhound Company. The attorney for petitioner said they were "very closely connected", "I have known it for years", after he had just said the connection "was a little bit remote", "somewhat remote." (R. 127, 128) The attorney for respondent said he was not "acceding to any of those statements". (See note 19 above.) After discussion the Court pointed out that the attorney for the petitioner "did not advise the court that he had any specific objection for cause against this juror". Petitioner's counsel said "it was an oversight on my part," and "it just slipped my mind" (R. 129). And after further discussion, petitioner's attorney conceded "a stockholder in the Greyhound Lines could not hope to profit or lose by virtue of a jury's verdict in this case against the Southern Pacific" (R. 130, 131).

It is apparent that the statement in the petition that Mr. Gale owned stock in the Greyhound "which he knows to be a subsidiary of the Southern Pacific Company" (f. 6) is not supported by the record.

23. The petition says: "The record fails to show that he mentioned Angus McDonald, former president of the S. P. Co., as one of his clients" (f. 7). No such statement was made. It could not have been made. Mr. McDonald died in November 1941, a year before this case went to trial, as the records in probate in the Superior Court of the State of California, in and for the County of Marin, will show, in the event petitioner's counsel is interested. The writer of this brief probated Mr. McDonald's estate.

year, with respondent as a shipper. Petitioner passed for cause.

The record shows as to the remaining four jurors who served:

Mrs. Phyllis B. Goeppner (R. 94-97) Housewife. Husband a partner in Podesta & Baldocchi, florist. Believed his firm had some business with respondent. She was unacquainted with any official of respondent and did not know whether her husband was acquainted with any of them. Respondent's counsel volunteered that he had a charge account at Podesta & Baldocchi's. Petitioner passed for cause.[24]

D. Richard Martens (R. 106-108) Retired commission merchant. Many years ago did business with respondent. Has done none for ten or twelve years. Not now personally acquainted with any officials of or people working for respondent. Petitioner passed for cause.[25] The trial court said: "I don't know, and I don't believe the evidence discloses what importance his financial standing or former business may be or may have been. Of course, one who is retired may be upon that status for many different reasons. It may be business failure or business success" or "change in his physical life or health. I don't know." (R. 82)

James A. Levensaler (R. 115-117) "General insurance." Did none with respondent, but did some with some of its employees. Knew Mr. McInnes, an important official of respondent. Petitioner passed for cause.

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24. The petition states the juror's "husband is a florist who does considerable business with the Southern Pacific Co." (f. 6). There is no showing that he or his firm did "considerable business".

25. The record does not show the character or extent of the business done with respondent, ten to twelve years ago.

Julian H. Hales (R. 120-122) Rice broker, selling on commission. At times of the year ships for customers over respondent. Knows the head of respondent's freight and passenger department. He was the one juror not expressly passed for cause by petitioner. But there was no challenge. The trial court said that "again we cannot tell without specific information as to the relative importance of his business as compared with that of the so-called managerial or employer class of business." He called himself a "rice broker and accountant." Accountants are not to be regarded in the managerial class, but as belonging to an independent calling. (R. 82)

JURYMEN CALLED INTO THE JURY BOX AND CHALLENGED OR EXCUSED.

Thirteen other names were called.

Two jurymen had some connection with the attorney for petitioner:

Mr. Futernick (R. 94) Bookbinder. He and petitioner's attorney "had had acquaintance for several years in a fraternal organization." Excused by respondent's first peremptory challenge. (R. 110)

Mrs. Mabel Lange (R. 119, 120) Housewife. Husband was sales manager for liquor business. Petitioner's attorney volunteered that he was "acquainted with the lady's husband." Excused by the court at respondent's request.

One juryman was acquainted with respondent's attorney. The record shows:

Elliot McAllister (R. 113-115) Vice-president of the Bank of California at which respondent kept an account. Had nothing to do with that account and was unacquainted with any officers or agents of respondent. A personal friend of the attorney for respondent—had known him about 20

years—both entered the University of California along in the 90s [20s] and were friends there. Had not seen a good deal of him—"we meet at social gatherings." The court excused Mr. McAllister after the attorney for respondent had stated "I will consent to the excuse of the juror so that counsel does not have to use a peremptory challenge, but I think it goes very far from good cause." The court stated that, as in the case of Mr. Desmond (see below), there was no "real basis for cause shown." (R. 115)

The record shows as to the other jurymen called:

Mr. Freese (R. 97-99) With Bancroft-Whitney Company, law book publishers, in charge of sales inside of the house, filling orders, etc. Did not know respondent's attorney who volunteered that he bought books from Bancroft-Whitney. Sold "not very many" books to respondent. Passed by petitioner for cause and excused by petitioner's first peremptory challenge. (R. 109)

Mr. Kahn (R. 100, 101) Insurance broker. Did no business with respondent, but knew one Blue, of the traffic department—met him about a year and a half ago—handling some of his personal fire insurance. Passed by petitioner for cause and excused by petitioner's second peremptory challenge. (R. 112)

Mr. Freise (R. 103-105) Connected with a firm (position not shown) which sold drawing material and blue-print material to respondent, and was acquainted with head of purchasing department; had charge of the correspondence. Passed by petitioner for cause and later excused by the court without challenge or explanation. (R. 122)

Bert A. Gayman (R. 109, 110) President of Link Belt Company, Pacific Division. Unacquainted with any officers

of respondent. The corporation had business dealings with respondent, as a shipper. Petitioner passed for cause. Later Mr. Gayman, although he had already said so, volunteered that his concern was a large shipper over respondent's lines, and although petitioner had passed for cause, he then "entered" a challenge for cause and it was allowed. (R. 119)

Mrs. Adrian (R. 110, 111) Housewife. Husband a civil engineer conducting his own business. He did no business with or for respondent that she knew of. He had no acquaintance with any officials or people working for respondent that she knew of. Petitioner passed for cause. Excused by respondent's second peremptory challenge. (R. 113)

Clarence E. Allan (R. 112, 113) Manager, Northern Assurance Company, which had insurance placed by respondent's brokers. So far as he knew, handled no insurance for any employees or officers of respondent. Passed by petitioner for cause and excused by petitioner's third peremptory challenge (R. 117)

Daniel J. Desmond (R. 113) Vice president of a real estate [sic.] concern which did in the neighborhood of $50,000 per year business with respondent, i.e., paid that much in freight rates. Personally acquainted with officials or employees of respondent. Excused by the court without challenge.

Mrs. Norma Walsh (R. 113) Wife of a captain in the United States Army in San Francisco on leave for only a few days. Excused by consent of both sides.

Arthur D. Levis (R. 117) Office manager of Walter Ellis Company, dealers in meal and foodstuffs. The company did

business with respondent practically every day, shipping over its lines. He had no personal contacts with any of respondent's agents or employes. Petitioner's challenge for cause sustained over respondent's objection.

Carl Welbach (R. 122) A director of Haas Bros., which did over $50,000 a year business with respondent. Petitioner's challenge was sustained and respondent excepted.

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SUPREME COURT OF THE UNITED STATES.

No. 349.—October Term, 1945.

Gilbert E. Thiel, Petitioner, *vs.* Southern Pacific Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[May 20, 1946.]

Mr. Justice Murphy delivered the opinion of the Court.

Petitioner, a passenger, jumped out of the window of a moving train operated by the respondent, the Southern Pacific Company. He filed a complaint in a California state court to recover damages, alleging that the respondent's agents knew that he was "out of his normal mind" and should not be accepted as a passenger or else should be guarded and that, having accepted him as a passenger, they left him unguarded and failed to stop the train before he finally fell to the ground. At respondent's request the case was removed to the federal district court at San Francisco on the ground of diversity of citizenship, respondent being a Kentucky corporation. Several vain attempts were then made by the petitioner to obtain a remand of the case to the state court; petitioner was also restrained from attempting to proceed further in the state court.[1]

After demanding a jury trial, petitioner moved to strike out the entire jury panel, alleging *inter alia* that "mostly business executives or those having the employer's viewpoint are purposely selected on said panel, thus giving a majority representation to one class or occupation and discriminating against other occupations and classes, particularly the employees and those in the poorer classes who constitute, by far, the great majority of citizens eligible for jury service." Following a hearing at which testimony was taken, the motion was denied. Petitioner then attempted to withdraw his demand for a jury trial but the respondent refused to consent. A jury of twelve was chosen. Petitioner thereupon challenged these jurors upon the same grounds

[1] The injunction against petitioner proceeding in the state court was affirmed upon appeal. Thiel v. Southern Pacific Co., 126 F. 2d 710; certiorari denied, 316 U. S. 698.

previously urged in relation to the entire jury panel and upon the further ground that six of the twelve jurors were closely affiliated and connected with the respondent. The court denied this challenge. The trial proceeded and the jury returned a verdict for the respondent.

Petitioner renewed his objections in his motion to set aside the verdict or, in the alternative, to grant a new trial. In denying this motion the court orally found that five of the twelve jurors "belong more closely and intimately with the working man and employee class than they do with any other class" and that they might be expected to be "sympathetic with the experiences in life, the affairs of life, and with the economic views, of people who belong to the working or employee class." The Ninth Circuit Court of Appeals affirmed the judgment in its entirety, 149 F. 2d 783, and we brought the case here on certiorari "limited to the question whether petitioner's motion to strike the jury panel was properly denied."

The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. *Smith* v. *Texas*, 311 U. S. 128, 130; *Glasser* v. *United States*, 315 U. S. 60, 85. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.

The choice of the means by which unlawful distinctions and discriminations are to be avoided rests largely in the sound discretion of the trial courts and their officers. This discretion, of course, must be guided by pertinent statutory provisions. So far as federal jurors are concerned, they must be chosen "without reference to party affiliations," 28 U. S. C. § 412; and citizens

cannot be disqualified "on account of race, color, or previous condition of servitude," 28 U. S. C. § 415. In addition, jurors must be returned from such parts of the district as the court may direct "so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service," 28 U. S. C. § 413. For the most part, of course, the qualifications and exemptions in regard to federal jurors are to be determined by the laws of the state where the federal court is located, 28 U. S. C. § 411.[2] *Pointer* v. *United States*, 151 U. S. 396. A state law creating an unlawful qualification, however, is not binding and should not be utilized in selecting federal jurors. See *Kie* v. *United States*, 27 F. 351, 357.

The undisputed evidence in this case demonstrates a failure to abide by the proper rules and principles of jury selection. Both the clerk of the court and the jury commissioner testified that they deliberately and intentionally excluded from the jury lists all persons who work for a daily wage. They generally used the city directory as the source of names of prospective jurors. In the words of the clerk, "If I see in the directory the name of John Jones and it says he is a longshoreman, I do not put his name in, because I have found by experience that that man will not serve as a juror, and I will not get people who will qualify. The minute that a juror is called into court on a venire and says he is working for $10 a day and cannot afford to work for four, the Judge has never made one of those men serve, and so in order to avoid putting names of people in who I know won't become jurors in the court, won't qualify as jurors in this court, I do leave them out. . . . Where I thought the designation indicated that they were day laborers, I mean they were people who were compensated solely when they were working by the day, I leave them out." The jury commissioner corroborated this testimony, adding that he purposely excluded "all the iron craft, bricklayers, carpenters, and machinists" because in the past "those men came into court and

[2] Federal statutes prohibit the service by any person as a petit juror "more than one term in a year," 28 U. S. C. § 423, exempt from jury service artificers and workmen employed in the armories and arsenals of the United States, 50 U. S. C. § 57, and set up disqualifications for service as a juryman or talesman "in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States," 28 U. S. C. § 426.

See, in general, Blume, "Jury Selection Analyzed: Proposed Revision of Federal System," 42 Mich. L. Rev. 831; Report to the Judicial Conference of Senior Circuit Judges of the United States of the Committee on Selection of Jurors (1942); Report of the Commission on the Administration of Justice in New York (1934).

offered that [financial hardship] as an excuse, and the judge usually let them go." The evidence indicated, however, that laborers who were paid weekly or monthly wages were placed on the jury lists, as well as the wives of daily wage earners.

It was further admitted that business men and their wives constituted at least 50% of the jury lists, although both the clerk and the commissioner denied that they consciously chose according to wealth or occupation. Thus the admitted discrimination was limited to those who worked for a daily wage, many of whom might suffer financial loss by serving on juries at the rate of $4 a day and would be excused for that reason.

This exclusion of all those who earn a daily wage cannot be justified by federal or state law. Certainly nothing in the federal statutes warrants such an exclusion. And the California statutes are equally devoid of justification for the practice. Under California law a daily wage earner may be fully competent as a juror. A juror, to be competent, need only be a citizen of the United States over the age of 21, a resident of the state and county for one year preceding selection, possessed of his natural faculties and of ordinary intelligence and not decrepit, and possessed of sufficient knowledge of the English language. California Code of Civil Procedure, § 198. Cf. § 199. Nor is a daily wage earner listed among those exempt from jury service. § 200. And under the state law, "A juror shall not be excused by a court for slight or trivial causes, or for hardship, or for inconvenience to said juror's business, but only when material injury or destruction to said juror's property or of property entrusted to said juror is threatened . . ." § 201.

Moreover, the general principles underlying proper jury selection clearly outlaw the exclusion practiced in this instance. Jury competence is not limited to those who earn their livelihood on other than a daily basis. One who is paid $3 a day may be as fully competent as one who is paid $30 a week or $300 a month. In other words, the pay period of a particular individual is completely irrelevant to his eligibility and capacity to serve as a juror. Wage earners, including those who are paid by the day, constitute a very substantial portion of the community,[3] a portion that can-

[3] In the San Francisco-Oakland industrial area in 1939 there were 76,374 wage earners employed by manufacturers out of a total population (as of 1940) of 1,412,686. Sixteenth Census of the United States: 1940, Manufactures 1939, Vol. III, p. 80.

not be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system. Were we to sanction an exclusion of this nature we would encourage whatever desires those responsible for the selection of jury panels may have to discriminate against persons of low economic and social status. We would breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged. That we refuse to do.

It is clear that a federal judge would be justified in excusing a daily wage earner for whom jury service would entail an undue financial hardship.[4] But that fact cannot support the complete exclusion of all daily wage earners regardless of whether there is actual hardship involved. Here there was no effort, no intention, to determine in advance which individual members of the daily wage earning class would suffer an undue hardship by serving on a jury at the rate of $4 a day. All were systematically and automatically excluded. In this connection it should be noted that the mere fact that a person earns more than $4 a day would not serve as an excuse. Jury service is a duty as well as a privilege of citizenship; it is a duty that cannot be shirked on a plea of inconvenience or decreased earning power. Only when the financial embarrassment is such as to impose a real burden and hardship does a valid excuse of this nature appear. Thus a blanket exclusion of all daily wage earners, however well-intentioned and however justified by prior actions of trial judges, must be counted among those tendencies which undermine and weaken the institution of jury trial. "That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may, one by one, lead to the irretrievable impairment of substantial liberties." *Glasser v. United States*, *supra*, 86.

It follows that we cannot sanction the method by which the jury panel was formed in this case. The trial court should have granted petitioner's motion to strike the panel. That conclusion requires

[4] See statement of Judge John C. Knox in Hearings before the House Committee on the Judiciary, 79th Cong., 1st Sess., on H. R. 3379, H. R. 3380 and H. R. 3381, Serial No. 3, June 12 and 13, 1945, p. 4. "When jurors' compensation is limited to $4 per day, and when their periods of service are often protracted, thousands upon thousands of persons simply cannot afford to serve. To require them to do so is nothing less than the imposition upon them of extreme hardship." *Id.*, p. 8.

us to reverse the judgment below in the exercise of our power of supervision over the administration of justice in the federal courts. See *McNabb* v. *United States*, 318 U. S. 332, 340. On that basis it becomes unnecessary to determine whether the petitioner was in any way prejudiced by the wrongful exclusion or whether he was one of the excluded class. See *Glasser* v. *United States*, *supra*; *Walter* v. *State*, 208 Ind. 231, 195 N. E. 268; *State ex rel. Passer* v. *County Board*, 171 Minn. 177, 213 N. W. 545. It is likewise immaterial that the jury which actually decided the factual issue in the case was found to contain at least five members of the laboring class. The evil lies in the admitted wholesale exclusion of a large class of wage earners in disregard of the high standards of jury selection. To reassert those standards, to guard against the subtle undermining of the jury system, requires a new trial by a jury drawn from a panel properly and fairly chosen.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice FRANKFURTER, with whom Mr. Justice REED concurs, dissenting.

This was a suit brought by the petitioner, a salesman, against the Southern Pacific Company for injuries suffered by him while a passenger on one of the Railroad's trains, and attributed to the Company's negligence. The trial was in the United States District Court sitting in San Francisco. The jury rendered a verdict against the petitioner. The District Court found no ground for setting it aside and entered judgment on the verdict. Upon full review of the trial, the Circuit Court of Appeals for the Ninth Circuit affirmed the judgment. 149 F. 2d 783. Thus, a verdict arrived at by a jury whose judgment on the merits the District Court has found unassailable, which the Circuit Court of Appeals has affirmed on the merits, and which this Court has refused to review on the merits, 327 U. S. —, is here nullified because of an abstract objection to the manner in which the district judges for the Northern District of California have heretofore generally discharged their duty, with the approval of the reviewing judges of the Ninth Circuit, to secure appropriate jury panels.

The process of justice must of course not be tainted by property prejudice any more than by race or religious prejudice. The task of guarding against such prejudice devolves upon the district judges, who have the primary responsibility for the selection of jurors, and the circuit judges, whose review of verdicts is normally final. It is embraced in the duty, formulated by the judicial oath, to "administer justice without respect to persons, and do equal right to the poor and to the rich . . . . " 1 Stat. 73, 76, 36 Stat. 1087, 1161; 28 U. S. C. § 372. But it is not suggested that the jury was selected so as to bring property prejudice into play in relation to this specific case or type of case, nor is there the basis for contending that the trial judge allowed the selective process to be manipulated in favor of the particular defendant. No such claim is now sustained. Neither is it claimed that the district judges for the Northern District of California, with the approval of the circuit judges, designed racial, religious, social, or economic discrimination to influence the makeup of jury panels, or that such unfair influence infused the selection of the panel, or was reflected in those who were chosen as jurors in this case. Nor is there any suggestion that the method of selecting the jury in this case was an innovation. What is challenged is a long standing practice adopted in order to deal with the special hardship which jury service entails for workers paid by the day. What is challenged, in short, is not a covert attempt to benefit the propertied but a practice designed, wisely or unwisely, to relieve the economically least secure from the financial burden which jury service involves under existing circumstances.

No constitutional issue is at stake. The problem is one of judicial administration. The sole question over which the Court divides is whether the established practice in the Northern District of California not to call for jury duty those otherwise qualified but dependent on a daily wage for their livelihood requires reversal of a judgment which is inherently without flaw.

Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. Since the color of a man's skin is unrelated to his fitness as a juror, negroes cannot be excluded from jury service because they are negroes. *E. g., Carter* v. *Texas*, 117 U. S. 442. A group may be excluded for reasons that are relevant not to their fitness but to competing considerations of public interest, as is true of the exclusion of doctors, ministers, lawyers, and the like. *Raw-*

lins v. *Georgia*, 201 U. S. 638. But the broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility. See *Smith* v. *Texas*, 311 U. S. 128, 130.

Obviously these accepted general considerations must have much leeway in application. In the abstract the Court acknowledges this. "The choice of the means by which unlawful distinctions and discriminations are to be avoided rests largely in the sound discretion of the trial courts and their officers." Congress has made few inroads upon this discretion. Its chief enactment underlines the importance of avoiding rigidities in the jury system and recognizes that ample play must be allowed the joints of the machinery. The First Judiciary Act adopted for the federal courts the qualifications and exemptions, with all their diversities, prevailing in the States where the federal courts sit. 1 Stat. 73, 88. That has remained the law. 36 Stat. 1087, 1164; 28 U. S. C. § 411. (For a collection of federal statutes regulating the composition and selection of jurors, see 37 Harv. L. Rev. 1010, 1098-1100.) We would hardly have taken this case to consider whether the federal court in San Francisco deviated from the requirements of California law, and nothing turns on that here. But it is not without illumination that under California law all those belonging to this long string of occupations are exempted from jury service: judicial, civil, naval, and military officers of the United States or California; local government officials; attorneys, their clerks, secretaries, and stenographers; ministers; teachers; physicians, dentists, chiropodists, optometrists, and druggists; officers, keepers, and attendants at hospitals or other charitable institutions; officers in attendance at prisons and jails; employees on boats and ships in navigable waters; express agents, mail carriers, employees of telephone and telegraph companies; keepers of ferries or tollgates; national guardsmen and firemen; superintendents, engineers, firemen, brakemen, motormen, or conductors of railroads; practitioners treating the sick by prayer. *California Code of Civil Procedure*, § 200.

Placed in its proper framework the question now before us comes to this: Have the district judges for the Northern District of California, supported by the circuit judges of the Ninth Circuit, abused their discretion in sanctioning a practice of not calling for jury duty those who are dependent upon a daily wage for their livelihood?

The precise issue must be freed from all atmospheric innuendoes. Not to do so is unfair to the administration of justice, which should be the touchstone for the disposition of the judgment under challenge, and no less unfair to a group of judges of long experience and tested fidelity. If workmen were systematically not drawn for the jury, the practice would be indefensible. But concern over discrimination against wage earners must be put out of the reckoning. Concededly those who are paid weekly or monthly wages were placed on the jury lists. And that no line was drawn against the wage earners because they were wage earners, and that there was merely anticipatory excuse of daily wage earners, is conclusively established by the fact that the wives of such daily wage earners were included in the jury lists. As to any claim of the operation of a designed economic bias in the method of selecting the juries, the Circuit Court of Appeals rightly found "no evidence that the persons whose names were in the box, or the persons whose names were drawn therefrom and who thus became members of the panel, were 'mostly business executives or those having the employer's viewpoint'." 149 F. 2d 783, 786.

"When the question is narrowed to its proper form the answer does not need much discussion.' The nature of the classes excluded was not such as was likely to affect the conduct of the members as jurymen or to make them act otherwise than those who were drawn would act. The exclusion was not the result of race or class prejudice. It does not even appear that any of the defendants belonged to any of the excluded classes. The ground of omission no doubt was that pointed out by the state court, that the business of the persons omitted was such that either they would have been entitled to claim exemption or that probably they would have been excused." So this Court speaking through Mr. Justice Holmes answered a related question in *Rawlins* v. *Georgia*, 201 U. S. 638, 640. And the justification for the answer applies to the present situation.

It is difficult to believe that this judgment would have been reversed if the trial judge had excused, one by one, all those wage earners whom the jury commissioner, acting on the practice of trial judges of San Francisco, excluded. For it will hardly be contended that the absence of such daily wage earners from the jury panel removed a group who would act otherwise than work-

ers paid by the week or the wives of the daily wage earners themselves. The exclusion of the daily wage earners does not remove a group who would, in the language of Mr. Justice Holmes, "act otherwise than those who are drawn would act." Judged by the trend of census statistics, laborers paid by the day are not a predominant portion of the workers of the country. See Sixteenth Census of the United States, 1940, Population, Vol. III, The Labor Force, Part 2, pp. 290 *et seq.* It certainly is too large an assumption on which to base judicial action that those workers who are paid by the day have a different outlook psychologically and economically than those who earn weekly wages. In the language of Mr. Chief Justice Hughes, "Impartiality is not a technical conception. It is a state of mind." *United States* v. *Wood*, 299 U. S. 123, 145. And American society is happily not so fragmentized that those who get paid by the day adopt a different social outlook, have a different sense of justice, and a different conception of a juror's responsibility than their fellow workers paid by the week. No doubt the insecurities of a system of daily earnings, or generally of wages on less than an annual basis, raise serious problems as does, of course, also the question of guaranteed wage plans. See the letter of President Roosevelt to the Director of War Mobilization, James F. Byrnes, on the date of March 20, 1945, carrying out the suggestion of a report to the President by the War Labor Board for the creation of a Commission to study the question of guaranteed wage plans. And see *Basic Steel Case*, 19 W. L. B. 568, 653 *et seq.*; N. W. L. B. Research and Statistics Report No. 25, Guaranteed Employment and Annual Wage Plans (1944). But these are matters quite irrelevant to the problem confronting district judges in dealing with the present plight of daily wage earners when called to serve as jurors and the power of the judges, as a matter of discretion, to excuse such daily wage earners from duty.

For it cannot be denied that jury service by persons dependent upon a daily wage imposes a very real burden. Judge John C. Knox, Senior District Judge of the Southern District of New York, thus described the problem:

> " . . . when jurors' compensation is limited to $4 per day and when their periods of service are often protracted, thousands upon thousands of persons simply cannot afford to serve. To require them to do so is nothing less than the imposition on them of extreme hardship.

"With respect to the item last-mentioned, it is easy to say that jury duty should be regarded as a patriotic service, and that all public-spirited persons should willingly sacrifice pecuniary rewards in the performance of an obligation of citizenship. With that statement I am in full accord; but it does not solve the difficulty. Adequate provision for one's family is the first consideration of most men. And if, with this thought predominant in a man's mind, he is required to perform a public service that means a default of an insurance premium, the sacrifice of a suit of clothes, or the loss of his job, he will entertain feelings of resentment that will be anything but conducive to the rendition of justice. In other words, persons with a grievance against the Government or who serve under conditions that expose them to self-denial are not likely to have the spiritual contentment and mental detachment that good jurors require." Hearings before H. R. Committee on the Judiciary on H. R. 3379, H. R. 3380, H. R. 3381, 79th Cong., 1st Sess. (1945) 8.

No doubt, in view of the changes in the composition and distribution of our population and the growth of metropolitan areas, a reexamination is due of the operation of the jury system in the federal courts. Just as the federal judicial system has been reorganized and administratively modified through a series of recent enactments (see Act of September 14, 1922, 42 Stat. 837, 838, 28 U. S. C. §§ 218 *et seq.*; Act of February 13, 1925, 43 Stat. 936, 28 U. S. C. §§ 41 *et seq.*; Act of August 7, 1939, 53 Stat. 1223, 28 U. S. C. §§ 444 *et seq.*), the jury system, that indispensable adjunct of the federal courts, calls for review to meet modern conditions. The object is to devise a system that is fairly representative of our variegated population, exacts the obligation of citizenship to share in the administration of justice without operating too harshly upon any section of the community, and is duly regardful of the public interest in matters outside the jury system. This means that the many factors entering into the manner of selection, with appropriate qualifications and exemptions, the length of service and the basis of compensation must be properly balanced. These are essentially problems in administration calling for appropriate standards flexibly adjusted.

Wise answers preclude treatment by rigid legislation or rigid administration. Congress has devised the appropriate procedure and instrument for making these difficult and delicate adjustments by its creation, in 1922, of the Conference of Senior Circuit

Judges. The Conference, under the presidency of the Chief Justice of the United States, is charged with the duty of continuous oversight of the actual workings of the federal judicial system and of meeting disclosed needs, either through practices formulated by the Conference, or, when legislation is necessary or upon appropriate, through proposals submitted to Congress. See 40 Harv. L. Rev. 431. That is precisely the course that has been followed in regard to the inadequacies in the operation of the federal jury system. In September, 1941, the late Chief Justice brought the matter before the Conference. As a result, Mr. Chief Justice Stone appointed a committee of experienced district judges, see Report of the Judicial Conference (1941) 16, under the chairmanship of Judge Knox who, because of the length and richness of his experience in the busiest district of the country, brought unusual equipment for devising appropriate reforms. In September, 1942, the Committee reported, Report to the Judicial Conference of the Committee on Selection of Jurors (1942) 1, and submitted proposals for legislation. *Id.* at 44, 62, 107. Bills to carry out these recommendations were introduced in the Senate on January 11, 1944, S. 1623, 1624, 1625, 78th Cong., 2d Sess., and in the House on June 5, 1945, H. R. 3379, 3380, 3381, 79th Cong., 1st Sess. Hearings were had upon the House Bills on June 12 and 13, 1945, and action on them is now pending.

The Court now deals by adjudication with one phase of an organic problem and does so by nullifying a judgment which, on the record, was wholly unaffected by difficulties inherent in a situation that calls for comprehensive treatment, both legislative and administrative. If it be suggested that until there is legislation this decision will be the means of encouraging the district judges to uncover a better answer than they have thus far given to a lively problem, an appropriate admonition from the Court would accomplish the same result, or common action regarding the practice now under review may be secured from the Conference of Senior Circuit Judges. To reverse a judgment free from intrinsic infirmity and perhaps to put in question other judgments based on verdicts that resulted from the same method of selecting juries, reminds too much of burning the barn in order to roast the pig.

I would affirm the judgment.